Lemon Drop Inn, Inc. *and* Hotel, Motel, Restaurant, Bar and Club Employees Union Local No. 99, Hotel and Restaurant Employees and Bartenders International Union, AFL–CIO

Lemon Drop Inn, Inc. *and* Hotel, Motel, Restaurant, Bar and Club Employees Union Local No. 99, AFL–CIO, Petitioner. Cases 18–CA–6944, 18–CA–6944–2, and 18–RC–12817

16 April 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 21 December 1981 Administrative Law Judge Robert W. Leiner issued the attached decision. On 17 August 1983 the Board remanded the proceeding to the judge for the purpose of preparing and issuing a supplemental decision setting forth certain credibility resolutions and containing new findings of fact and conclusions of law. On 31 August 1983 the judge issued the attached supplemental decision. The Respondent has filed exceptions to both decisions, with supporting briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decisions and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order, as modified.

As our dissenting colleague notes, the unlawfulness of the purpose of each employee's termination must be established before such termination can be found to violate Section 8(a)(3). However, the Board and the courts have long regarded union animus demonstrated by 8(a)(1) coercion as a highly significant factor in determining motive. *Blue Star Knitting*, 216 NLRB 312, 318 (1975); *NLRB v. Dan River Mills*, 274 F.2d 381, 384 (5th Cir. 1960); *R. J. Lallier Trucking v. NLRB*, 558 F.2d 1332, 1325 (8th Cir. 1977). Also well recognized as an important circumstance indicating antiunion motivation is timing—an employee's discharge occurring soon after the employer learns of his union activity. See 1 Morris, *The Developing Labor Law*, 193, 214, and cases cited in Chapter 7, fns. 75, 198, and 199 (2d ed. 1983). These factors are applicable both to the discharge of Jody Griffith and to the layoff of Betty Brock. And they present, along with other circumstances discussed in the judge's decision and peculiar to each termination, a strong prima facie case that, as found by the judge, union activity was a motivating factor in both cases. Further, we agree with the judge that the Respondent has failed to offer persuasive evidence that the reasons it assigned for the termination were the real reasons. Thus, we adopt the judge's analysis of the Respondent's defense to the 8(a)(3) allegations, except as corrected in footnote 1 of this decision, and conclude that the alleged violations of Section 8(a)(3) have been established.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Lemon Drop Inn, Inc., Duluth, Minnesota, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Delete paragraph 1(c) and reletter the subsequent paragraphs accordingly.

2. Insert the following as paragraph 2(b) and reletter the subsequent paragraphs accordingly.

"(b) Remove from its files any reference to the unlawful discharge of Jody Griffith and the unlawful layoff of Betty Brock and notify the employees in writing that this has been done and that these will not be used against them in any way."

3. Substitute the attached notice for that of the administrative law judge.

CHAIRMAN DOTSON, dissenting in part.

While I agree with my colleagues that the judge's credibility findings with regard to the Respondent's threat to close its restaurant establish a violation of Section 8(a)(1), I do not believe the

[1] The judge incorrectly found, in connection with the layoff of Betty J. Brock, that the Respondent hired 11 waitresses in November 1980. As these hirings occurred after Brock was employed and during a period in which the Respondent usually experienced a diminution of business, the judge's error does not affect the correctness of his analysis of the hiring as a factor in finding unpersuasive the Respondent's asserted business justification for terminating Brock.

The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] In the absence of exceptions we adopt, pro forma, the judge's finding that the Respondent's no-solicitation and no-distribution rules violated Sec. 8(a)(1) of the Act and that the Respondent did not violate Sec. 8(a)(1) by its enforcement of its rule regarding food consumed by employees. However, we will not order the Respondent to remedy this violation by refraining from promulgating or maintaining a rule prohibiting conduct during "working time." Subsequent to the judge's decision, the Board issued *Our Way, Inc.*, 268 NLRB 394 (1983), in which it overruled *T.R.W. Bearings*, 257 NLRB 442 (1981), relied on by the judge, and returned to the rules in *Essex International*, 211 NLRB 749 (1974). Since the rules involved here would be lawful on their face, under our *Our Way* no useful purpose would be served by ordering the Respondent to expunge, or otherwise not to promulgate, its rules. The Order and notice are modified accordingly.

In view of his adherence to *T.R.W. Bearings* and his dissenting opinion in *Our Way*, Member Zimmerman would adopt the remedy recommended by the judge.

General Counsel has proved a prima facie case of unlawful motivation in the discharge of employee Griffith and the layoff of employee Brock.

Griffith was discharged only after, as the judge found, he acted in an insubordinate manner toward his shift manager, Peterson. Peterson decided to discharge Griffith but another shift manager, Stoneburner, persuaded him to give Griffith an opportunity to talk things out with Peterson. Stoneburner, therefore, wrote on the work schedule he was about to post for the following week a notation for Griffith to see Peterson. Several days later Stoneburner saw Griffith and asked him if he had talked to Peterson. Griffith said he had not. Stoneburner related this to Brown, the Respondent's chief operating officer, who previously had expressed surprise that Peterson had not fired Griffith immediately. Brown told Stoneburner to discharge Griffith and Stoneburner did, citing his earlier insubordination and his failure to talk to Peterson.

In the face of his eminently reasonable justification for discharging Griffith, the General Counsel alleges and the judge finds that Griffith was discharged because he participated in soliciting an employee to sign a union authorization card and was overheard on one other occasion talking about the Union. To find that Griffith's union activities constituted the real reason for Griffith's discharge, the judge relies on the 8(a)(1) threat and the Respondent's receipt, on the day before the discharge, of a letter from the Union demanding recognition and bargaining. These events are insufficient to warrant the inference of a motivation other than the one which the Respondent stated. The commission of an independent 8(a)(1) violation, even together with some known union activity by the discharged employee, does not prove a specific antiunion purpose behind the discharge in question. *Midwest Stock Exchange v. NLRB*, 635 F.2d 1255, 1264 (7th Cir. 1980). Cf. *Larid Printing*, 264 NLRB 369, 370 (1982); *NLRB v. Service Garage*, 668 F.2d 247 (6th Cir. 1982). Here, an unlawful statement by a supervisor who was not involved in the discharge is too weak a link between the union activity and the discharge on which to build a case under the circumstances presented. Except for that supervisor's statement there is no evidence of an antiunion response to the organizing activity. Griffith's misconduct, although minimized by the judge, was not refuted. Imposition of discipline for misconduct is a managerial decision which may not be disturbed absent convincing evidence of pretext and unlawful purpose. *Midwest Stock Exchange v. NLRB*, supra at 1265. I would thus heed the comment adopted by the Seventh Circuit in *Midwest Stock Exchange*, pronounced by the Fifth Circuit in *NLRB v. McGahey*, 233 F.2d 406, 412–413 (1956):

> The Board's error is the frequent one in which the existence of the reasons stated by the employer as the basis for the discharge is evaluated in terms of its reasonableness. If the discharge was excessively harsh, if lesser forms of discipline would have been adequate, if the discharged employee was more, or just as, capable as the one left to do the job, or the like then, the argument runs, the employer must not actually have been motivated by managerial considerations, and (here a full 180 degree swing is made) the stated reason thus dissipated as pretense, nought remains but antiunion purpose as the explanation. But as we have so often said: management is for management. Neither Board nor Court can second-guess it or give it gentle guidance by over-the-shoulder supervision. Management can discharge for good cause, or bad cause, or no cause at all. It has, as the master of its own business affairs, complete freedom with but one specific, definite qualification: it may not discharge when the real motivating purpose is to do that which Section 8(a)(3) forbids.

As to the layoff of Brock, who knew when she was hired in the fall that business slowed down in the winter, the link between her insignificant union activity of serving as the Union's election observer and her subsequent layoff is even weaker.[1] The seasonable nature of the Respondent's business is undisputed, as is the fact that the Respondent's employee complement was down, that Brock was the least senior of the hostesses, and that her position remained vacant until she was recalled in the spring. While a suggestion was made, when Brock was hired, that she might be reassigned to waitress duty when business got slow, there is no evidence that she requested such a reassignment at the time of the layoff. In light of the business justification, whether the Respondent's decision to lay Brock off was made before or after her minimal union activity there is simply no proof that such activity was a factor.

Accordingly, I would dismiss both allegations of 8(a)(3) violations.

[1] An employee may serve as a union's observer in response to simply being asked and does not necessarily indicate prounion sympathies.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT terminate, discharge, or lay off, or otherwise discriminate against any of our employees because of their activities in behalf of, sympathy, for, or membership in Hotel, Motel, Restaurant, Bar and Club Employees Union No. 99, Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO, herein called the Union, thereby discouraging membership in the Union, or in any other labor organization.

WE WILL NOT threaten to close down or go out of business if our employees choose the Union, or any other labor organization, to serve as their collective-bargaining representative.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Jody L. Griffith and Betty J. Brock immediate and full reinstatement to their former jobs or, if such jobs no longer exists, to substantially equivalent positions, and WE WILL make them whole for any loss of pay they may have suffered by reasons of our discrimination against them, with interest.

WE WILL notify Jody Griffith and Betty J. Brock that we have removed from our files any reference to their respective discharge and layoff and that these will not be used against them in any way.

LEMON DROP INN, INC.

DECISION

STATEMENT OF THE CASE

ROBERT W. LEINER, Administrative Law Judge. Upon the charge in Case 18-CA-6944 being filed and served on November 10, 1980, by Hotel, Motel, Restaurant, Bar and Club Employees Union Local No. 99, Hotel, Motel, and Restaurant Employees and Bartenders International Union, herein called the Union, upon Respondent, Lemon Drop Inn, Inc.; and the charge and two amended charges in Case 18-CA-6944-2 having been filed by the Union and respectively served on Respondent on or about December 29, 1980, January 9, 1981, and February 11, 1981, the Acting Regional Director for Region 18, National Labor Relations Board, herein called the Board, issued a complaint and notice of hearing in Case 18-CA-6944 on December 24, 1980, and thereafter, on February 19, 1981, the Regional Director issued an order consolidating these cases, amendment to the complaint and a further notice of hearing. At the hearing, the amended complaint was further amended. Respondent filed timely answers to the several General Counsel complaints and amendments.

Pursuant to a petition for certification filed by the Union on November 5, 1980, and upon a Stipulation for Certification Upon Consent Election executed by Respondent and the Union, and approved by the Regional Director for Region 18 on November 28, 1980, a Board-supervised election by secret ballot was conducted in a unit of Respondent's employees employed in the Lemon Drop Inn facility in Duluth, Minnesota, on Wednesday, December 17, 1980. The tally of ballots served on the parties on that day showed, inter alia, that of 45 votes cast, excluding a void ballot, there were 22 valid votes cast for the Union and 22 votes cast against the Union, with 1 challenged ballot. The challenged ballot was found sufficient to affect the results of the election.

On December 24, 1980, the Union filed timely objections to the election which resulted in the Regional Director causing an investigation to be conducted on the issues raised by the objections and the challenged ballot. Following the Union's withdrawal of all other objections, the remaining objection alleged that the Respondent, on November 5, 1980, discharged its employee, Jody L. Griffith, because of his support and activities on behalf of the Union. The Board agent conducting the election challenged the ballot of Jody L. Griffith because his name did not appear on the voter eligibility list. Respondent contends that Griffith was discharged for lawful reasons prior to the election and was therefore ineligible to vote; the Union contends that Griffith was discharged in violation of Section 8(a)(1) and (3) of the Act and was eligible to vote. The discharge of Griffith was alleged as unlawful in the complaint in Case 18-CA-6944.

In his February 26, 1981 Report on Objections and Challenged Ballot, the Regional Director concluded that the November 5, 1980 Griffith discharge, allegedly in violation of Section 8(a)(1) and (3), occurred on a date between the filing of the petition for certification (November 5, 1980) and the date of the election (December 17, 1980). Thus, the Regional Director concluded that the alleged unlawful discharge raised substantial and material questions of fact with regard to the Union's objections, the resolution of which could be resolved only by a hearing; and the alleged unfair labor practice may be considered as objectionable conduct in determining whether the election should be set aside. Further, the matter of Griffith's eligibility to vote could be resolved only by disposition of the alleged unfair labor practice concerning his preelection discharge.

In consequence of the above findings, the Regional Director, on February 26, 1981, together with his Report on Objections, issued an order directing a hearing on the discharge of Griffith as a matter of objection to the conduct of the election, and further issued an order consolidating that hearing with that of the consolidated unfair labor practice cases. The consolidated complaint alleges,

inter alia, in addition to the alleged unlawful discharge of Griffith, the unlawful discharge (but not objectionable conduct), on or about December 22, 1980, also in violation of Section 8(a)(3), of Respondent's employee Betty J. Brock; and, as further amended at the hearing, various acts of independent violation of Section 8(a)(1) of the Act (but not objectionable conduct) including the distribution among employees, on or about January 13, 1981, of an employee rule book wherein Respondent promulgated and maintained rules prohibiting all discussions of unions on Respondent's property.

At the conclusion of the General Counsel's case-in-chief, on Respondent's motion, I dismissed as unproved so much of the complaint (par. 5(c)) as alleged that Respondent, on or about December 20, 1980, unlawfully implemented a new rule requiring employees to pay for their own food before consuming same. Pursuant to Respondent's further motions to dismiss allegations of complaint, I either denied or reserved decision on them referring disposition thereof to the instant recommended Decision and Order.

On August 26 and 27, 1981, in Duluth, Minnesota, pursuant to prior notice, a consolidated hearing was held on the allegations of the amended consolidated complaint as further amended, together with the matters raised by the objection and challenged ballot. Respondent and the General Counsel were represented by counsel, were given full opportunity to call and examine witnesses, to introduce testimony and evidence, and to argue orally on the record. At the conclusion of receipt of testimony, all parties waived oral argument and thereafter Respondent and the General Counsel filed timely briefs which were carefully considered.

On the record as a whole, including the briefs and my observation of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges, Respondent admitted in its pleadings or at the hearing, and I find that, at all material times, Lemon Drop Inn, Inc., a Minnesota corporation with an office and place of business in Duluth, Minnesota, has been and is engaged in the operation of a public restaurant selling foods and beverages at retail. It is further admitted, and I find, as alleged, that Respondent has been and is a wholly owned corporate subsidiary of Como Oil Company, a Minnesota corporation, with places of business in the States of Minnesota and Wisconsin, which is engaged, as a jobber, in the retail and nonretail sale and distribution of petroleum products, including home heating oil and fuel for motor vehicles. Respondent admits that, at all material times, it and Como Oil Company have been, and are, affiliated businesses with common officers, ownership, directors, management, and supervision, with a commonly formulated and administered labor relations policy affecting the employees of the two enterprises; and that it and Como constitute both a single integrated business enterprise and single employer within the meaning of the Act.

Further, Respondent admits that in the calendar year ending October 31, 1980, Respondent and Como, in the course and conduct of their combined business operations, derived gross revenues in excess of $500,000 and purchased and received at their facilities, within the State of Minnesota, products, goods, and materials valued in excess of $50,000 shipped directly from points outside the State of Minnesota. Respondent admits, and I find that, at all material times, Respondent has been, and is, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE UNION AS A STATUTORY LABOR ORGANIZATION

The complaint alleges, Respondent admits, and I find that, at all material times, the above-captioned Union has been, and is, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES; OBJECTIONABLE CONDUCT; RESOLUTION OF THE VOTING ELIGIBILITY OF GRIFFITH

The consolidated complaint, paragraph 5(a), alleges that in or about late October or early November 1980 Respondent, acting through its manager Joel Berg,[1] threatened that Respondent would close its doors if the employees selected the Union as their bargaining representative. In support of this allegation, the General Counsel's witness, Ruby Cassidy, testified that around October 29 or 30, 1980, while she, a waitress, and her co-waitresses, Sherry Rubarb and Sharon Borg, were all on duty, about noon, standing in the hallway near the kitchen, Berg told them that he previously had overheard Cassidy talking about the Union with Jody Griffith and told the waitresses that he "better not hear of it anymore because Mr. Hall [the owner of Como Oil and Respondent] said he'd close the doors [of the Lemon Drop Inn] and we wouldn't have a job." (Tr. 257.) Cassidy said that there was no response from her or her coemployees.

Joel Berg denies Cassidy's testimony but admits having made such a statement in the spring of 1980 (Tr. 513–514) before any of the present union organizational effort occurred and under vastly different circumstances.

Cassidy admitted that she was discharged by Respondent on May 25, 1981, for having called in sick, an excuse not accepted by the Company notwithstanding that, at the hearing, Cassidy insisted that she was ill at the time. On the other hand, notwithstanding that neither the General Counsel nor Respondent called or accounted for the absence of Sherry Rubarb as a witness to this alleged Berg statement, Sharon Borg, an alleged witness to this statement, did testify as a witness for the General Counsel. Yet, as counsel for Respondent expressly admitted (Tr. 152), Sharon Borg was a witness favorable to Respondent. Her demeanor and hesitant, equivocal testimony concerning certain conversations with Respondent's supervisors clearly supports Respondent's admission. Borg's testimony is discussed hereafter.

[1] The Lemon Drop Inn has three shift managers, all of equal and concededly supervisory status: Joel Berg, Keith Stoneburner, and Jess Peterson.

It might well be that, as Respondent argues, Cassidy's credibility was undermined because of her having been discharged for cause, and because contrary to my sequestration order, she spoke to her husband (who was in the hearing room) prior to her testimony (but allegedly on subjects not concerning the hearing). I regard this latter circumstance as of little consequence and, on the present facts, not prejudicial. *RAI Research Corp.*, 257 NLRB 918 (1981). In addition, her testimony concerning the Berg threat (which included the identification of Griffith with union activities) was "convenient" in that it included an unlawful Respondent admonition against union activities as early as October 29 or 30 and named Jody Griffith.

The issue, of course, is not whether Cassidy actually discussed union activities but whether Berg made the statement as of the time Cassidy testified. Borg was present at the conversation according to Cassidy. Borg was a witness friendly to Respondent. Borg testified at the hearing and was still employed at the Lemon Drop Inn. Respondent's failure to call Borg to deny Cassidy's testimony leads to the inference, which I draw, that she would not have denied Cassidy's testimony.

In addition, Borg testified that even before she notified Respondent on November 3 that Cassidy and Griffith were handing out union membership cards, Respondent apparently knew of union activity among its employees. Moreover, Berg admitted to making such a statement albeit he placed it as occurring in harmless circumstances. However, I regard Respondent's failure to call or recall Sharon Borg, an admittedly friendly witness, in its employ, to deny the Cassidy testimony concerning Supervisor Joel Berg's threat that Respondent would close down and the employees would lose their jobs if a union came in and warning them against continued conversation about the Union, as the dispositive element in favor of believing Ruby Cassidy and crediting her testimony that Berg did make this statement on or about October 29 or 30, 1980. His threat at that time of a closedown by Miles Hall, and with his warning against conversations about the Union are unlawful coercive acts of a most serious character and violate Section 8(a)(1) of the Act, I so find. *NLRB v. Jamaica Towing*, 632 F.2d 208 (2d Cir. 1980); *General Stencils*, 195 NLRB 1109 (1972). That he attributed the threat of closedown to another supervisor's action is not material. *J. W. Mays, Inc.*, 147 NLRB 942, 964 (1964), enfd. in pert. part 356 F.2d 693, 699 (2d. Cir. 1966).[2]

The complaint further alleges that on or about December 20, 1980, Respondent, by its manager Keith Stoneburner,[3] commenced enforcing a previously unenforced rule regarding food consumed by employees to be served by another employee.

In support of this allegation, the General Counsel adduced testimony of Betty J. Brock. Brock testified that when she was first employed on or about September 29, 1980, a coemployee told her that the employees did not pay for tea or coffee they consumed. On the other hand, Brock admitted that managers have asked employees whether they paid for their food but that this usually happened with only particular employees. She said this was Respondent's practice since the start of her employment. In addition, she testified that she did not drink coffee but either brought tea from home or served herself tea and sat in the back except on rare occasions when she drank her tea in the front and watched the cash register since she was one of Respondent's three hostesses. She admitted that there was a company food rule whereby waitresses served cooks, waitresses, and other employees but that only cooks served themselves.

Respondent's witnesses, particularly Brown and Stoneburner, testified that Respondent posted a typewritten food policy rule on the employee bulletin board on October 1, 1980, and, at the same time, put memoranda on each timecard of employees working in the period ending October 15, 1980, advising employees of the food policy already posted on the employee bulletin board. In support of its early October advice to employees, Respondent and the General Counsel stipulated that employee timecards showed (metal) staple marks. Respondent's witnesses testified that the staple holes on the timecards arose from wire staples which had supported the memoranda attached thereto. In addition, Respondent's testimony was uncontradicted that it surrendered to the National Labor Relations Board the previously posted, typed food policy memorandum at the commencement of the Board investigation following the November 10, 1980 filing of the first charge. Nevertheless, Brown also testified, without contradiction, that because the employees did not pay absolute attention to the stapled memorandum on their timecards or the posted typewritten memorandum, Respondent also posted on the bulletin board a further handwritten memorandum, drafted by Stoneburner, which stated:

> 1. No one cooks their own food or gets their own desserts or beverages.
>
> 2. Anything a customer is not able to get an employee can.
>
> 3. All food is to be eaten in the restaurant at the back table.

[2] The General Counsel also elicited similar testimony from Griffith. Griffith stated that sometime in early October 1980, after he had received his pay raise but before Griffith met with the Union in late October, while he was in the manager's office with Berg and a cook by the name of Connor, Connor suddenly asked Berg, without prompting, what would happen if they had a union in the restaurant. According to Griffith, Berg answered, "We close the doors." The General Counsel did not elicit this testimony for the purpose of an unfair labor practice but merely to show union animus and hostility on behalf of Respondent. The General Counsel did not seek to corroborate this testimony by the testimony of the other witness present at this alleged conversation, Connor. Respondent did not call Connor or explain Connor's whereabouts in refuting the testimony.

Berg denied making any such statement to Griffith. In view of the disposition of a similar Berg statement which was the subject of Cassidy's testimony, it is unnecessary and merely cumulative to resolve this conflict. I refrain from doing so.

[3] As above noted, Respondent's managers at the Lemon Drop Inn, Keith Stoneburner, Joel Berg, and Jess Peterson, are admitted to be Respondent's supervisors and agents within the meaning of the Act. Similarly, Lawrence (Larry) Brown, treasurer of Como Oil Company and chief operating officer of Respondent, is similarly admitted to be a statutory supervisor and Respondent's agent within the meaning of the Act.

No take out food.

I conclude from the above testimony that, while Respondent's enforcement of the rule concerning food consumed by employees was neither fully effective nor fully enforced, there is no question that the rule existed and no question that it was changed on or about October 1, 1980. In addition, there is no showing, by disparate treatment or otherwise, that, because on or about December 20, as Brock testified, Stoneburner asked her whether she paid for the tea (and insisted that she pay for it) Respondent suddenly was enforcing a previously unenforced rule.

I conclude, on the basis of the above, that the preponderant credible evidence demonstrates that Respondent, at all material times, had a rule which required all food consumed by employees (other than cooks) to be served by other employees and that Brock was mistaken in believing that no such rule existed. That Respondent was not sucessful in enforcing the rule against all employees or in enforcing it at all times does not make the rule unenforced and certainly does not prove that the unenforced rule suddenly came life on December 20, 1980. I conclude that the General Counsel failed in his statutory burden to prove that on or about December 20, 1980, Respondent commenced enforcing a previously unenforced rule regarding the service by employees of food to be served by other employees, and therefore I do not find a violation of Section 8(a)(1). I recommend that paragraph 5(b) be dismissed as unproven.[4]

Lastly, the General Counsel alleges, paragraph 5(d), that Respondent violated Section 8(a)(1) of the Act because, on or about January 13, 1981, Respondent issued and distributed an employee rule book whereby Respondent promulgated and maintained a rule "prohibiting all discussions of unions on Respondent property." There is no dispute (Jt. Exh. 1) that on or about January 13, 1981, Respondent issued, and now enforces, an eight-page document entitled "Lemon Drop Personnel Policies" drafted by its labor relations representative (William R. Sample). At pages four and five therein, Respondent's rules regarding "Solicitation" appear. On pain of discipline including discharge, the rules expressly forbid, inter alia, *solicitation* (or distribution of literature) on Respondent's "premises" by employees during "worktime" on behalf of, inter alia, any labor union. The prohibition applies to all forms of solicitation, particularly promoting "support for any cause or organization" and forbids off duty employees to "enter or remain anywhere on the premises" for such solicitation.[5]

Discussion and Conclusions

The complaint, paragraph 5(d), alleges that Respondent's new rules against employee solicitation (Jt. Exh. 1), violate Section 8(a)(1) of the Act in that Respondent therein promulgated and maintained a rule prohibiting "All discussion of unions on the Respondent's property." No other allegation appears in the complaint.

The first and second paragraphs in the rules, pages four-five, Joint Exhibit 1, relating to "Solicitation," is that employees may not "solicit or promote support for any cause or organization during his or her working time . . . or the working time of the employee at whom such activity is directed." The sixth paragraph makes the prohibition applicable to labor union solicitation. The Board rule, in the recent *T.R.W. Bearings*, 257 NLRB 442, 443 (1981), is that:

> In view of the foregoing, we hold that rules prohibiting employees from engaging in solicitation during "work time" or "working time," without further clarification, are, like rules prohibiting such activities during "working hours," presumptively invalid.

In reaching this rule, the Board overruled to the extent inconsistent, *Essex International, Inc.*, 211 NLRB 749 (1974). Respondent's prohibition, under *T.R.W.*, supra, is clearly presumptively invalid. I conclude that Respondent's newly circulated "personnel policies" in paragraphs 1 and 2 prohibit union solicitation by employees, including "promoting support" for unions, during "working time" and that the presumptive invalidity of such rules was not rebutted by a demonstration that such restriction on statutorily protected activity was required for purposes of production, safety, or discipline. Thus, Respondent violated Section 8(a)(1) by the promulgation and maintenance of such rules (prohibiting solicitation on "worktime").[6]

[4] As above noted, at the end of the General Counsel's case I dismissed as unproven par. 5(c) of the complaint which alleged that on or about December 20, 1980, Respondent implemented a *new* rule requiring employees to pay for their own food before consuming it.

[5] The text of the scope of the prohibitions is:

SOLICITATION:

Rules governing solicitation or distribution of literature by employees and outsiders are as follows:

1. No employee shall solicit or promote support for any cause or organization during his or her working time.

2. No person shall solicit or promote support for any cause or organization by contacting an employee during the working time of the employees at whom such activity is directed.

3. No employee shall distribute or circulate any written or printed material during his or her working time or in work areas at any time.

4. No person shall distribute or circulate any written or printed material to any employee during the working time of the employee at whom such activity is directed.

5. Outsiders and off duty employees are not authorized to enter or remain anywhere on the premises for the purpose of soliciting or for distributing literature of any kind.

6. These rules apply to all types of solicitation and distribution activities, including, but not restricted to, charitable organizations or campaigns, labor unions, political parties, religious organizations, clubs, societies and associations. It does not apply to promotional programs wherein the Company's facilities are contracted for and used in specific areas for such declared purposes.

All employees are expected to comply strictly with these rules. Failure to obey the rules will result in discharge or other disciplinary action. Any employee who is in doubt concerning the application of these rules while on the premises is advised to consult with management.

[6] I note, in passing, that Respondent's other rules, 3 and 4, which, inter alia, prohibit *distribution* or circulation of any written or printed material (circulation of union membership cards being "solicitation") during the distributor's, and distributee's "worktime," appear also to be presumptively unlawful within the prohibition of *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615 (1962), as modified by *T.R.W.* Only the prohibition against "discussion" was alleged as unlawful by the General Counsel. Since the prohibition against "circulation" was not alleged, and seems specifically

Continued

The Discharge of Jody L. Griffith

Activities among Respondent's employees in support of the Union started on or about October 28, 1980, and on or about Saturday, November 1, 1980, some 8 to 10 of them (including Griffith) (G.C. Exh. 2) attended a union meeting and signed union membership cards. As a result of the meeting, Union Local President Carol Carlson, on November 3, 1980, dispatched a letter of that date (G.C. Exh. 3) which Respondent received in the afternoon of November 4, 1980. The letter asserts that Local 99 represented the majority of Lemon Drop employees and requested a meeting in order to discuss a contract relating to wages, hours, and working conditions. The letter offered a "card check" by a neutral third party at Respondent's restaurant in the morning of the next day, November 5, 1980. After cautioning Respondent against any acts of discrimination or intimidation against employees, Respondent stated that it had "simultaneously filed a petition with the National Labor Relations Board." In fact, however, the petition, while it may have been mailed on November 3, was filed at the Labor Board at 8:34 a.m., on November 5, 1981 (G.C. Exh. 1).

On October 1, 1980, Griffith received a 25-cent-per-hour wage increase and engaged in a conversation with one of Respondent's three "managers" who, on varying shifts, were the highest Respondent supervisors running the Lemon Drop Inn.[7] The manager who announced the pay raise to Griffith was Keith Stoneburner who told him that Respondent's supervisors had been "watching" Griffith's performance and felt that he deserved a raise. Griffith, hired by Respondent in April 1980 as a dishwasher, was made a cook 6 to 8 weeks after being hired. He remained a cook until his discharge on November 5, 1980. In announcing the pay raise to Griffith, Stoneburner told him that performance, rather than length of service, was critical in determining that he merit a raise. Sometime on or about the time of the raise, when Griffith was apparently loitering in a place where he did not belong and Manager Joel Berg told him to go where he belonged, Griffith responded by saying: "If you don't like it, you can fire me."[8] No discipline resulted from the exchange.

Consistent with Respondent's policy of not permitting employees to eat food which they serve themselves (except if they are cooks), on Sunday, November 2, 1980, while Griffith and waitress-hostess Ruby Cassidy were eating together in the restaurant, they were served by waitress Sharon Borg. There is no dispute that they asked Borg, at that time, on November 2, 1980, to sign a union membership application card, and that Borg then and there did so.

Called as a witness by the General Counsel, when the General Counsel showed Borg her signed union membership application card, there was an immediate objection by counsel for Respondent on the ground that the mere showing of the card to Sharon Borg was an act of "intimidation" of the witness. When inquiry was made as to why the mere showing of an otherwise lawful card was an act of "intimidation," counsel for Respondent asserted that Borg, a Respondent employee at the time of her testimony, was a witness favorable to Respondent. I infer that the General Counsel's showing of the card was construed to be an act designed in some way to undermine Borg's persuasion or loyalty. In any event, Borg testified that while she was waiting on Cassidy and Griffith, they told her that it was her "last opportunity" to sign the card. Borg then signed the card but that night apparently had second thoughts when she spoke to her husband, a former manager of the Lemon Drop.

Joel Berg, manager of the Monday, November 3, 6:30 a.m. to 3 p.m. shift, testified that at 7 a.m. he received a phone call from Sharon Borg telling him that she had something to say to him and Larry Brown and wanted a meeting with them away from the Lemon Drop restaurant. A meeting was in fact arranged at the Como Oil office at 9 a.m. which meeting was attended by Borg, Brown, and Berg. She told them that, after talking to her husband, she felt an obligation to tell Brown that the Union was trying to organize the restaurant; that she had been asked to sign a union card; and that she did sign a union card. Brown and Berg testified that Borg mentioned only Cassidy as approaching her to sign the card. Borg, however, testified that she told Brown and Berg that "Ruby and Jody" gave her the card in the restaurant and she also told them when it happened. Later, in further direct testimony, it appeared that she could not recall telling Brown and Berg *who* gave her the card. She also testified that Brown and Berg suspected that there was talk of getting the Union in the restaurant although they said nothing of Cassidy or Griffith. When prodded on the point, she said that there was nothing in what Brown and Berg said but it was her *conclusion* that they suspected that there was union activity in the restaurant. She then added that it appeared to her that Brown and Berg were "to some extent" suprised at the news of union activity in the restaurant. I was not impressed by Borg's veracity.

to *have* not been alleged, I need not and do not pass on it. However, rule *five's* prohibition against outsiders or "off duty employees" remaining anywhere on the premises for the purpose of *both* "soliciting" and distributing union literature would appear to run afoul of the *Le Tourneau* rule. See *Stoddard-Quirk Mfg. Co.*, 139 NLRB 615, 618–619, and *Mandarin*, 221 NLRB 264 (1975). Since the prohibition encompasses "on the premises" rather than narrowly limiting it to work areas, the prohibition is further unlawful. *G. F. Business Equipment*, 252 NLRB 866 (1980); *Continental Bus System*, 229 NLRB 1262 (1977). Thus, since rule 5 relates to solicitation, and hence to "discussion," I pass on its validity and conclude that it is presumptively invalid; that such presumption was not rebutted and that it violates Sec. 8(a)(1) both as to employees remaining on *and* entering Respondent's nonwork areas to solicit on behalf of the Union. I note, finally, that at p. 4 of the rules (Jt. Exh. 1), "off-duty" employees are allowed on the premises to patronize Respondent. See Conclusion of Law 1, herein.

[7] The chief operating officer of Lemon Drop, Larry Brown, visited the Lemon Drop Inn approximately three times a day but maintained his office at Como Oil Company, several miles away. He testified and Respondent conceded (Br., p. 2) that Lemon Drop managers made their own decisions to hire and fire, and that he becomes involved in the discharge of an employee only when a manager requests his advice (Tr. 471).

[8] Griffith is 19 years old; Manager Berg, 23 years old; and Manager Jess Peterson, 20 years old. It appeared to me that Larry Brown was twice the age of his managers.

On demeanor alone, without Respondent's concession, I would conclude that Borg was a witness favorably disposed to Respondent. However, Borg initially admitted that she told Berg and Brown, on Monday morning, November 3, that it was Griffith and Cassidy who gave her the card to sign. To the extent that Borg appeared to modify her prior testimony by suggesting that she could not remember telling Berg and Brown that morning that it was "Ruby and Jody" who gave her the union card, I do not credit such subsequent failure to remember. Not only her testimony but the circumstances fail to suggest *why* she would unaccountably omit Griffith as one of the card solicitors in her conversation with Borg and Brown. I therefore specifically discredit both Berg and Brown in their testimony that Borg told them it was only Ruby Cassidy who solicited her to sign the card. I thus conclude that on the morning of November 3, 1980, Borg told Brown and Berg that Griffith was engaged in card-soliciting activity in support of the Union.[9]

After Borg told Berg and Brown of the events of the previous day (November 2), Brown cautioned Berg and Borg to say nothing of this event to any of the employees and to carry on as usual. Berg recalls that Brown told them to run the restaurant in the same way that they had done before, to do nothing about the Union, and not to mention the Union to anyone or what had happened at their meeting. Thus, this meeting ended sometime after 9 a.m. on November 3, 1980. About 5 p.m. of this day, as more fully discussed below, Brown met with Manager Stoneburner at the restaurant and noticed that the words "see Jess [Peterson]" were the only notations on Griffith's work schedule (for the period Tuesday (November 4) through Monday (November 10)).

On the next day, Tuesday, November 4, 1980, Respondent received in the mail, about 2 p.m., the certified letter (G.C. Exh. 3) from the Union, asserting its majority status, requesting negotiations toward a collective-bargaining agreement and noting its simultaneous filing of a petition with the National Labor Relations Board. The letter, addressed to the president of Como Oil, Miles F. Hall, was seen by Brown about 2 o'clock. He immediately told Manager Jess Peterson that there would be a meeting of the managers that day at 5 p.m. About 5 p.m., Brown, together with his three Lemon Drop managers (Stoneburner, Berg, and Peterson), met in Brown's office at Como Oil. Brown testified that he believed that accompanying the letter was a union list of "do's and don'ts," on the union stationery, addressed to employers, describing various prohibitions against interference with employee rights under the National Labor Relations Act. Brown testified that although he did not inspect the many prohibitions mentioned in the document (R. Exh. 5) he told the managers, generally, what conduct to avoid and to conduct their business as usual. None of the testimony of Respondent's witnesses (Brown, Stoneburner, Peterson, and Berg) present at the November 4 meeting relates to a description concerning Respondent's *position* concerning the employees' attempt to gain bargaining rights through the Union. The only reference, as above noted, was with regard to the "do's and don'ts" of employer conduct towards the employees.

After discussing receipt of the Union's letter requesting recognition, the subject was then changed to Griffith. As Keith Stoneburner testified, all four of the Lemon Drop supervisors present at the meeting wondered what they should "do" with Griffith. In fact, Stoneburner used the very words: "What to do with Griffith" as the language used at the meeting. Stoneburner testified that Peterson explained to Joel Berg and Larry Brown what had happened on the previous Friday, October 31, 1980, regarding an incident between Manager Peterson and Jody Griffith. There was no testimony suggesting that Griffith's union activities were discussed. Respondent's witnesses stated that Peterson's explanation to Berg and Brown was necessary because they and particularly Berg had no prior knowledge of the incident. Brown, of course, knew of the incident because, as Stoneburner testified, on cross-examination, he had mentioned the Griffith incident to Brown as early as 5 p.m. on November 3, 1980, in describing the odd work scheduling notations as will be hereinafter more fully described. Brown testified that on November 3, when Stoneburner told him of the incident, he told Stoneburner that he was surprised that Peterson did not fire him on the spot. In addition, Brown testified (Tr. 474) that, at the November 4 meeting, Peterson and Stoneburner told him that, before the meeting, they had, together, decided to fire Griffith (Tr. 473). Yet, Peterson's pretrial statement to the National Labor Relations Board clearly states: (1) he was not involved in the decision to terminate Griffith; (2) nothing was said at the November 4 meeting about terminating Griffith; and (3) Peterson merely wanted to talk to Griffith before he worked again (Tr. 342–343). Nothing was said about Griffith being terminated if he failed to speak to Peterson by Wednesday, November 5.

As a result of the meeting of November 4, 1980, at which Larry Brown became extremely irritated with Keith Stoneburner for his scheduling Griffith to work on Friday, November 7, it was Stoneburner, at Brown's direction, who on November 4 directed that Griffith be discharged on Wednesday, November 5, 1980, at 9:30 p.m.

Stoneburner, on November 5, 1980, drafted a discharge notice which, inter alia, read as follows:

> His employment was terminated because of his insubordination. He did not clean windows when he was asked and he left *without permission* from manager [Jess]. When told to come in to talk to Jess about Circumstance he never showed up, claiming

[9] The General Counsel adduced considerable testimony regarding employees Judy Helgesen and Jody Griffith (at the end of October, after union activities started) engaging in a conversation in Respondent's parking lot where they were allegedly overheard by, and followed by, Manager Joel Berg. No evidence was produced linking Berg with any attempted surveillance of Helgseen and Griffith notwithstanding he was present when they were in the parking area. Moreover, the evidence is unclear as to whether Helgesen and Griffith even mentioned the Union either inside the restaurant or as they walked outside into the parking lot. I conclude that, on this record, there was no proof of an act of surveillance by Berg and I specifically find that no evidence shows that Berg was suspicious of Helgesen and Griffith engaging in a discussion of the Union at that time.

he was to [sic] busy. This is why he was discharged. [Emphasis added.]

As below noted, Peterson testified that he gave Griffith permission to leave (Tr. 327). Whereas at the hearing, Peterson testified that he knew that Stoneburner discharged Griffith (Tr. 344), as late as his December 10, 1980 statement to the National Labor Relations Board, he stated he did not know *who* made the *decision* to discharge Griffith; only that Stoneburner and Brown talked it over after the November 4 meeting (Tr. 342).

Stoneburner testified that, when he told Brown, on November 5, that Griffith had not seen Peterson, Brown directed him to telephone Griffith and disharge him.

The Sequence of Events from October 31 (Friday) Through November 5 (Wednesday), 1980

Stoneburner came to work on Friday, October 31, 1980, at his regular scheduled time toward 3 p.m. He saw Manager Jess Peterson who was upset because, as he told Stoneburner, he had instructed Griffith to wash the outside windows of the restaurant and that Griffith performed poorly. The events of the afternoon of October 31 regarding Griffith's failure to properly wash the windows are actually not in dispute and a composite of the testimony of Peterson and Griffith shows that, about 9:30 a.m., Griffith asked Peterson to leave at 2 p.m., an hour early, because of personal considerations. I find that Peterson told Griffith that he would let him know later as to whether Griffith would be given permission to leave an hour early.[10] According to custom, Brown took lunch at the Lemon Drop Inn, had lunch with the manager on duty, Peterson, and Brown suggested that the windows be cleaned. Thereafter, Peterson asked the two cooks, Scott Hansen and Jody Griffith, which of the two would volunteer to clean the windows. When neither volunteered, Peterson asked Griffith to clean the windows and Griffith told him that he was "pissed" in being selected to do the job. Griffith testified that at about 2 p.m. when he next saw Peterson, he again asked to leave early, but Peterson said that the windows had to be cleaned.

In any event, Griffith got the window washing equipment and started to wash the eight 6-by-8 foot windows which job ordinarily takes about a half hour. About 10 minutes later, he returned to Peterson's office and told him that he had finished and also added that, if Peterson did not like it, he could fire him. Peterson then left to check the windows and discovered that there were marks on the windows and the ledges were dirty. He returned to the office, got Griffith, and showed him the unacceptable windows. While he was describing the inadequate job, with his back to Griffith, Griffith left and Peterson ended up talking to himself. Peterson had told him to return and clean up the windows. Griffith retrieved the equipment and again cleaned the windows. About 10 minutes later, Griffith returned to Peterson's office, again told him that he was finished, and added, "I'm leaving." Peterson told him that that was not the way employees left Respondent's premises when they were scheduled to work and that he must get *permission* before punching out. Griffith then said: "Yes, sir, I understand; may I punch out?" Peterson testified that he answered yes and that then Griffith then punched out.

Peterson also testified that an hour or two thereafter, he hired Steven Donovan as a daytime cook. He testified that he hired Donovan on October 31 because he did not want Griffith working there any longer (Tr. 303) and, indeed hired Donovan as a replacement[11] for Griffith.[12]

About 3 p.m. Peterson said that he told Manager Stoneburner, who was coming on duty, that he was upset with Griffith and did not want Griffith working there any longer. Stoneburner recalled that Peterson said that he was going to fire Griffith but Stoneburner said that Griffith was a good employee; that Peterson should talk to Griffith first and work things out with him. Stoneburner said that that was Larry Brown's rule regarding disputes with employees. Stoneburner, on cross-examination, was unsure whether Peterson, on October 31, told him that Peterson had given Griffith permission to leave. His testimony varied from an inability to remember to an assertion that Peterson said that Griffith had left *without* permission. Then Stoneburner stated that he was probably in error in his testimony. The parties stipulated that Griffith punched out at 2:35 p.m. on Friday, October 31, 1980.

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[10] Scott Hansen, present during certain Griffith-Peterson conversations, still employed by Respondent at the time he testified, was unclear whether he heard Griffith ask Peterson to leave early at any time.

[11] Brown testified that as of November 4, he believed that before Griffith could be *reinstated* he was obligated to first speak with Peterson by November 5 (Tr. 444–445, 476). Griffith had not been laid off or discharged by anyone over this incident prior to his actual November 5 discharge. Thus his being "reinstated" at that early point appears premature. Moreover, if Peterson hired Donovan on October 31 or, as other Respondent records (G.C. Exh. 15) show, November 4, to replace Griffith, then Griffith's failure to come in and speak to Peterson by Wednesday, November 5, was a merely academic gesture and a futility. Donovan's hiring mooted the matter. On the other hand, Brown insisted that Griffith was directed to speak not only to Peterson by Wednesday, November 5 (Tr. 476), but, contrary to Peterson's testimony that he hired Donovan on October 31 (Tr. 302) Respondent's records show he was hired as late as November 5 (R. Exh. 6). At bottom, Peterson's inconsistent testimony (and pretrial statement) and Brown's contrary testimony and Respondent's records are difficult to reconcile. Peterson cannot at the same time assert that he hired Donovan (Tr. 303–304) either on October 31 or on November 4 (G.C. Exh. 15) to replace Griffith and that Donovan did replace Griffith because he did not want Griffith working any longer and then state that he had no objection to Stoneburner scheduling Griffith to work (Tr. 330) but merely wanted to *talk* to Griffith *before he worked again* (Tr. 330). Such testimony and activity by Peterson is, in turn, inconsistent with Brown's testimony that, as late as November 4, at their November 4 meeting, it was not only *their* (Stoneburner's and Peterson's) decision to discharge Griffith, but that it had been made before November 4 (Tr. 473). Brown says that, at the November 4 meeting, he forbid the Griffith discharge by Peterson and Stoneburner but, as above, Peterson says that nothing was said at the meeting about discharging Griffith. I do not credit Respondent's witnesses regarding the source, timing, or motivation of the hiring of Steve Donovan or, more particularly, the Griffith discharge. (Compare Tr. 342–343 with Tr. 473–476). The only reasonably clear "facts" to be deduced from this labyrinth is that, as Respondent's records show, Donovan was scheduled to work no earlier than November 5 (G.C. Exhs. 8a and 8b) and that, no later than November 3, Peterson had changed his mind and thus had no objection to Griffith working for Respondent provided Griffith speak to him first.

[12] Donovan did not testify at the hearing. Counsel for Respondent stated and Respondent's records show that Donovan was no longer in Respondent's employ. Peterson did not testify that he told Donovan that he was being hired as a replacement.

As above noted, it was on Monday, November 3, 1980, about 9 a.m., when Borg, Berg, and Brown met in Brown's Como office and Berg told them that Griffith and Cassidy had solicited her to sign a union card.

Sometime on either the previous Saturday or Sunday, November 1 or 2, according to Stoneburner's testimony, he was charged with the obligation to execute the work schedule for all employees and managers for the period Tuesday, November 4, through Monday, November 10. He testified that he scheduled Donovan to work on Wednesday, Thursday, and Friday (November 5 through 7) and posted the schedule after 8 p.m. on November 3 (Monday), after a phone conversation with Peterson, as appears below.

About 5 p.m., according to his usual custom, Brown visited the Lemon Drop Inn on November 3 (Monday) and Stoneburner told him of the proposed schedule. When he saw the schedule he saw that Stoneburner had written the words "see Jess" across the columns on the work schedule form for part of Tuesday, all of Wednesday, and part of Thursday (R. Exh. 19). Brown testified that he asked Stoneburner what that meant and Stoneburner told him of the Peterson-Griffith window washing incident. Stoneburner testified that, when Brown asked about the meaning of "see Jess," Stoneburner told Brown that Peterson wanted to fire Griffith if the matter could not be worked out, but agreed not to do so and speak to him first. Brown testified that he told Stoneburner he was surprised Peterson did not fire Griffith on the spot but did not give any advice or direct any action for either Peterson or Stoneburner.

Meanwhile it should be noted that Scott Hansen, a cook, like Griffith, on October 31, asked Stoneburner, who was then preparing the November 4-November 10 work schedule for time off to go deer hunting on the following weekend, from Friday, November 7, through Monday, November 10. Stoneburger never told Peterson of Hansen's request.

About 8:30 of that evening, November 3, 1980, after Brown had earlier seen the work schedule, Stoneburner posted it. About the same time, he recalled that deer hunter Scott Hansen had requested the next weekend off commencing November 7. Around 8:30 p.m., November 3, 1980, Stoneburner telephoned Peterson and told him that he had already scheduled Scott Hansen to work the following weekend of November 7, 8, and 9 (Friday through Sunday) but had forgotten that Hansen had requested the weekend off to go deer hunting. Stoneburner told Peterson that he would put Griffith on the schedule for Friday, November 7, and Monday, November 10, in place of Hansen but wanted Griffith to consult Peterson first. Peterson said that he had *no objection* but "wanted to see Griffith first before he started to work on Friday [November 7, 1980]."

Manager Jess Peterson was scheduled to work (G.C. Exh. 9) the morning shift on Tuesday and Wednesday, November 4–5 (6:30 a.m. through 4 p.m.), and the evening shift on Thursday, November 6, from 4 p.m. to closing around midnight.

Shortly after the conversation between Peterson and Stoneburner, about 8:30 p.m., on November 3, a day on which he was not scheduled to work, Griffith visited the Lemon Drop to check the work schedule for the following week. Griffith testified that when he saw the schedule, contrary to the testimony of Brown and Stoneburner, above, he saw that, in each of the spaces on the work schedule wherein he was not scheduled to work, i.e., in the spaces allotted to Tuesday, November 4, Wednesday, November 5; Thursday, November 6; Saturday, November 8, and Sunday, November 9, there was the notation "see Jess."[13] For the reasons cited in the the accompanying footnote, I credit much of Stoneburner's version. I conclude that the November 3 posted Griffith work schedule, seen by Griffith, contained the statement "see Jess," but that this phrase, however, was spread over all the spaces occupied for Tuesday, Wednesday, and Thursday, November 4–6, rather than merely, as Stoneburner would have it, squeezed substantially into the Wednesday space with some overlapping in Tuesday and Thurday. I also conclude that there was no line drawn horizontally through the spaces. I make these findings on the theory that Stoneburner, in accordance with his conversation and agreement with Peterson earlier that evening, wanted and desired Griffith to see Peterson before he started to work on Friday, November 7. In addition, I credit Griffith's testimony: that on November 3, while he was copying down Peterson's work schedule, Keith Stoneburner told him to "see Jess"; failed to tell him why he should see him; and (Griffith, as below noted, would not be obliged to infer that the reason was his own misconduct) did not say when, in particular, he should see Peterson.[14] Further, I also

[13] Stoneburner admitted that immediately after Griffith was discharged on November 5, allegedly because Griffith ceased being an employee, he erased the entire work schedule on the Jody Griffith line which he had posted. The document being rendered useless for this purpose, oral testimony was admitted. See G.C. Exh. 8(a), as opposed to G.C. Exh. 8(b), which is the reconstructed work schedule according to the testimony of Jody Griffith. While such conduct, on this record, might lead to an inference of spoliation, I believe that there is insufficient surrounding evidence to support such a conclusion. Any such reference may be refuted, in part, I believe, in Griffith's testimony which leads to the illogical situation of having "see Jess" inserted by Stoneburner even after the first day of Griffith's scheduled work, Friday, November 7. It is reasonable that such an admonition would appear on the spaces of Tuesday, Wednesday, and Thursday but hardly on Friday and Saturday after Griffith was supposed to start work and even when Peterson was not scheduled. I therefore conclude not only that Griffith's recollection of the schedule as he recalled it as of 8:30 p.m., November 3 (G.C. Exh. 8(b)), was erroneous, but that Stoneburner's testimony, except as to spacing of the words "see Jess," is more accurate; that no negative inference need be drawn, and that, in any event, "see Jess" was spread all over the spaces assigned for Tuesday, Wednesday, and Thursday (November 4, 5, and 6) rather than merely squeezed mostly into Wednesday with some minor overlapping into Tuesday and Thursday. Such a conclusion is consistent with Peterson's work schedule and would force Griffith to see Peterson at Peterson's convenience, i.e., when Peterson was working at the restaurant. Compare R. Exh. 19 with G.C. Exhs. 8(a) and 8(b).

[14] Stoneburner testified that he specified that Griffith was to see Peterson on either Tuesday or Wednesday, but not on Thursday, notwithstanding that Peterson was scheduled to work Thursday (as well as Tuesday and Wednesday) and notwithstanding that the "see Jess" which Stoneburner drafted (and which Griffith copied down on Monday night, November 3) clearly included and referred to Thursday, November 6. I do not credit such testimony. Neither Brown nor Stoneburner could reasonably explain or support their testimony that Thursday in some way was too late and that 2 days were enough time for Griffith to act notwithstanding that Peterson's testimony and prior statement to the Board consistently demonstrate that he wanted merely to talk to Griffith and

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credit Griffith's uncontradicted testimony that notes to employees are frequently placed on the schedules and that it is not rare for there to exist a notation for a particular employee to see a particular manager, although this had not happened to Griffith prior to this time. It is for this reason that I have concluded, above, that Griffith would not necessarily infer the reason for Stoneburner's direction.

Thus, crediting Griffith's contrary testimony, I do not credit Stoneburner's testimony that he told Griffith to see Peterson because Peterson was upset with him; and I further conclude that Stoneburner did not tell Griffith to see Peterson only on Tuesday or Wednesday (which were only two of the three days on which Peterson was scheduled to work); and I particularly discredit Stoneburner's explanation as to why, in any event, he did not at that time tell Griffith that he could also see Peterson on Thursday, as well. Stoneburner testified that he told Griffith to see Peterson on Tuesday or Wednesday only because "2 days were enough."[15] I conclude that the only thing that Stoneburner told Griffith on Monday night, November 3, was for Griffith to see Peterson before Griffith started to work on Thursday, a finding consistent with Peterson's pretrial statement, his testimony, and the Peterson and Griffith work schedules. Indeed, I further conclude that Stoneburner's (and Brown's) testimony with regard to "2 days are enough" was a post-facto explanation to dovetail the reason Griffith was precluded from speaking with Peterson on Thursday, a scheduled Peterson workday, with the fact that Brown, through Stoneburner, already caused Griffith to be discharged on Wednesday, November 5, 1980.

As above noted, about 2 p.m. of the next day, November 4, 1980, when Brown received the Union's letter requesting recognition and bargaining, he scheduled a meeting of his managers at Como Oil for about 5 p.m., at which time the Union's demand was discussed (without detail in this record) but not Respondent's position regarding the Union. It was about this point that the managers, in general, and Stoneburner, in particular, asked: "What do we do about Jody [Griffith]?" Although Stoneburner (and Peterson) testified that at this point Peterson explained to Berg and Brown the facts of Griffith's insubordination of the preceding October 31, I find it difficult to believe that Brown and Berg were unfamiliar with Griffith's conduct in view of the fact that Berg is a manager in the same restaurant as Stoneburner and Stoneburner had explained it to Brown the evening before. Rather, I conclude that Stoneburner's question ("What do we do about Jody?") occurred in the context of the discussions of the Union's request for recognition and the identification of Griffith as a union card distributor who, destined for discharge therefor, had been innocently scheduled on November 3 for work on Friday, November 7. Thus, I find it was then that Stoneburner testified that he told the group, for the first time, that he had already scheduled Griffith for work having acceded to Scott Hansen's request for time off for the period beginning Friday, November 7. Stoneburner obviously was not privy to Brown's and Berg's knowledge of November 3, for Respondent's witnesses, at this point, mutually corroborate each other in that Brown then became very upset, telling Stoneburner that, when he had left Stoneburner on the preceding evening, Stoneburner told him that Griffith would have to talk to Peterson first before being permitted to work. Stoneburner told Brown that he had no alternative for, after giving Hansen time off, there was no other person to schedule for the cook's job on Friday, November 7. Stoneburner then asked Brown: "Now what do we do?" Brown answered that they could not fire Griffith now because Stoneburner had actually scheduled him for work (Tr. 345) and, since Griffith was actually scheduled, they could talk to him but not fire him. Stoneburner recalls that Brown said this to all three of them. Yet, as above noted, even if Respondent's witnesses are credited and Griffith had only Tuesday and Wednesday to talk to Peterson, Brown's firm desire to fire Griffith was manifested on that Tuesday, when Griffith still had the *admitted* opportunity to come in and talk to Peterson all day, Wednesday, November 5.

Wednesday, November 5, 1980

On Wednesday, November 5, a payday, about 4:30 p.m., Griffith came to the Lemon Drop to pick up his pay. The manager on duty, Keith Stoneburner, distributed the paychecks. Griffith testified that Stoneburner asked him whether he had been in to see Peterson as yet. When Griffith said that he had not, Stoneburner asked him why. Griffith answered that he planned to see Peterson when he was in town because it was too expensive to drive in just to talk to him for 10 or 15 minutes. Stoneburner did not tell Griffith when to see Peterson, did say to be sure and see him, but did *not* mention the gravity of the situation.

About an half hour later, about 5 p.m., Larry Brown came to the Lemon Drop office and spoke to Stone-

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not to discharge him. Thus, on November 3, when faced with Stoneburner's forgetfulness in scheduling Hansen, Peterson showed no reluctance in voicing agreement to Griffith being scheduled for work on Friday, November 7. The heat, animus and direction for discharge all started the next day, from Brown, when he discovered Stoneburner's "mistake": the scheduling of Griffith (actually the posting of the schedule), according to Stoneburner, prevented Brown's November 4 discharge of Griffith and resulted in Brown's reluctant November 4 admonition that the managers talk to Griffith, but not fire him. The only person, therefore, who wanted the discharge was Brown; and this, remarkably on November 4 when, at that time, Griffith still had at least Wednesday, November 5, to come in and talk, even if Respondent's witnesses are credited and Griffith was *not* afforded Thursday as an opportunity to "see Jess." While Respondent is under no legal obligation to be logical or even reasonable in its relation to its employees, I cannot help but observe that Brown's rather harsh and illogical actions must be viewed in the context of the General Counsel's prima facie case; of Respondent, on this record, having singled out Griffith for a merit pay increase only a few weeks before, together with a commendation; of Brown's receipt of (a) knowledge of Griffith as a union card distributor early on November 3; and (b) the Union's request for recognition on November 4; and (c) of Brown's displays of anguish and animus on the subject of discharging Griffith; and of Peterson's desire to talk to Griffith before he started to work.

[15] Again, since Brown, on Wednesday evening, November 5, directed Stoneburner to telephone Griffith and discharge him, Respondent's witnesses could hardly permit Griffith to "see Jess" on Thursday, when Jess Peterson was still scheduled to work, to expiate his October 31 insubordinate attitude. It is unnecessary to speculate what prompted Brown to act on Wednesday when he could have waited until Thursday, except that he might have feared Griffith actually visiting Peterson's on Thursday before working on Friday, as scheduled.

burner. He asked whether Griffith had spoken to Peterson. Stoneburner told him that he had spoken to Griffith and that Griffith told Stoneburner that he was "too busy" to talk to Peterson. I credit Griffith's testimony that he told Stoneburner that he would see Peterson when he was next in town and it is quite possible that Stoneburner told Brown, in characterizing the conversation he had had with Griffith, that Griffith had said that he was "too busy" to talk to Peterson at that time. In any event, Brown then told Stoneburner that, if Griffith was too busy to talk about his job, he should not be on the payroll and Brown told Stoneburner to discharge Griffith.

About 7:30 the same evening, Griffith again came to the restaurant and asked Stoneburner for permission to leave his car on the company parking lot. Stoneburner said that he granted him permission but told Griffith to speak to him on his return. When Griffith returned about 9:30 p.m., Stoneburner asked him if he had seen Peterson as yet and Griffith answered that he had not. Although Stoneburner did not use the word insubordination, he told Griffith that he was terminated. Griffith asked if that was all that Stoneburner had to say and, when Stoneburner said that was all, Griffith left. Stoneburner testified that he had told Griffith that he was terminated because he did not come in to talk with Peterson and because of the window incident on Friday. It is unnecessary to resolve this conflicting testimony.

Immediately after his discharge of Griffith, on Wednesday night, Stoneburner prepared the discharge notice (R. Exh. 13). As above set forth the Stoneburner-drafted discharge memorandum notes that Griffith was discharged for insubordination when, after failing to properly clean the windows and was asked to do so, he left *without permission* from Peterson. Again, it should be noted that Peterson, on cross-examination, admitted that he never told Stoneburner that Griffith left without permission. In fact, Peterson's testimony demonstrates that, after admonishing Griffith concerning Griffith's insubordinate attitude in declaring that he would leave, he reminded Griffith that he needed permission from Peterson. Peterson admits that he then did give Griffith *permission* to leave.

In this same regard, Stoneburner testified, at first, that at the November 4 meeting Peterson said that he had *not* given permission to Griffith to leave, then said that he could not remember and then said that Peterson declared that he, Griffith, had left without permission. Thereafter, Stoneburner said that the last part of his testimony was erroneous and that Peterson did give Griffith permission to leave (Tr. 583). Stoneburner gave no explanation why he drafted the erroneous November 5 discharge memorandum which shows that Griffith's discharge, inter alia, was based on his leaving without permission (R. Exh. 13). As the General Counsel observes (Br., p. 8), Brown failed to consult Peterson on the discharge.

Discussion and Conclusions

I have already concluded that Cassidy's testimony, concerning Berg's statement of "closing down" in response to unionization, should be credited over Berg's denial; that Berg's late October 1980 statement to Cassidy in the presence, inter alia, of Sharon Borg, a witness favorable to Respondent, that he had overheard Cassidy talking to Griffith about the Union and that he had better not hear anymore of it because Respondent would close the doors if employees brought in the Union, violated Section 8(a)(1) of the Act. Regardless of any similar statement to Griffith, I conclude that Respondent has demonstrated a degree of animus against labor organizations to affect its personnel dispositions and, in my judgment, the credibility resolutions regarding the discharge of Griffith. I do not suggest that the presence of union animus requires a conclusion that the Griffith discharge was motivated by his union activities; I do conclude that Berg's late October 1980 threat and admonition to Cassidy (which threat of a closedown is among the most serious and coercive statements of union animus and coercion, *General Stencils*, 195 NLRB 1109, 1110 (1972); *NLRB v. Jamaica Towing*, 632 F.2d 208 (2d Cir. 1980)), coming immediately before the Union's claim of majority status and so soon before the November 5, 1980 discharge of Griffith, may well be taken into account with regard to the ultimate inference of Respondent's motivation.

I conclude that Respondent's discharge of Griffith on November 5, 1980, violated Section 8(a)(3) and (1) of the Act; that Respondent's defenses are either palpably untrue (failure to obtain permission to leave) or pretextual (insubordination in failing to see Peterson); and that such discredited defenses, themselves, support the inference of an illegal motive, especially in the presence of a prima facie case, *Heartland Food Warehouse*, 256 NLRB 940 (1981), and cases cited therein.

In preliminarily assessing the lawfulness of the discharge under the *Wright Line* analysis,[16] the General Counsel proved a prima facie case when he adduced credible testimony that Respondent, both through the testimony of Cassidy regarding Berg's retaliatory threat after overhearing the alleged union conversation between her and Griffith (thus giving Respondent knowledge or at least suspicion of Griffith's union activity) and through Borg's testimony that she told both Brown and Berg, on November 3, 1980, that Cassidy and Griffith had solicited her to sign a union card. Such credited testimony, from a reluctant witness, is strong evidence that Respondent had actual knowledge of Griffith as a union card distributor and activist. That knowledge, acquired on this record no earlier than on or about October 31 and no later than November 3, 1980, occurring concurrently with Berg's expression of union animus, and followed in a few days by the discharge of one of the two union card distributors, fully describes the elements (timing, knowledge, animus, and precipitate discharge) of a prima facie case of violation of Section 8(a)(1) and (3) of the Act in the discharge.

Respondent ultimately defends the discharge on the grounds that it did not discharge Griffith for any unlawful reason within the meaning of the Act, but rather discharged him because (1) of his insubordinate attitude in washing or failing to wash the windows for Peterson on

[16] *Wright Line*, 251 NLRB 1083 (1980).

October 31, 1980; (2) he failed to follow Respondent's instruction to see Peterson to discuss his distress over Griffith's Friday misconduct in failing to properly wash windows; and (3) his leaving the premises on October 31 without permission from Peterson on that same Friday afternoon. If Respondent's overall motivation included, in fact, a geniune reliance on Griffith's conduct or misconduct, then, according to Board rule, there would be two reasons for the discharge and the Board rule in such case, *Wright Line*, 251 NLRB 1083 (1980), would place the burden of proof, following the General Counsel's proof of a prima facie case, on Respondent to prove that its discharge of Griffith was motivated entirely apart from any union considerations and was based wholly on the above three reasons. However, the Board does not require an analysis of Respondent's "dual motive" where the alleged basis for the discharge is found to be pretextual. In this regard, the Board has specifically cautioned against believing that the Board will attach significance to merely articulated reasons for discharge or discipline where they were ultimately found to be pretextual. See *American Tool Co.*, 257 NLRB 608, 609 fn. 4 (1981). In short, in the instant case, while I have no doubt that on October 31 Griffith behaved in an insubordinate manner before Peterson (as he had previously behaved, without consequences, to Manager Berg: that if he did not like Griffith's conduct, Berg could fire him), I conclude, nevertheless, that Respondent seized on Griffith's Friday night "insubordination" and his failure to speak to Peterson on the following Tuesday and Wednesday as convenient "straw man" excuses to fire him because of his union activities. Nothing further need be said of the third reason for the discharge, Griffith's failure to receive Peterson's permission to leave, because it was admitted by Stoneburner, author of the discharge memorandum, to be untrue. Since I independently do not credit either of the remaining two "reasons" for the discharge, I need not reach or decide the extent to which the obviously false (and nowhere explained) third "reason" poisons the other two.

In reaching these conclusions, I rely on the following findings to support the pretextual nature of reasons for the discharge of Griffith.

1. In the first place, one must recall that Griffith, according to Stoneburner, was an employee whose performance had been under Respondent's observation in consequence of which it was concluded that the quality of his work merited the special pay raise on or about the beginning of October 1980, no more than a month before his discharge. It is odd that although Brown, on November 5, directed Stoneburner to use the telephone, if necessary, to discharge Griffith, none of Respondent's supervisors ever informed Griffith, from October 31 through November 5, that he faced discharge—for whatever reason.

2. Peterson, the object of Griffith's insubordinate and insolent attitude in the window washing incident of Friday, October 31, may well have expressed great displeasure at that misconduct to Stoneburner on the afternoon immediately after its occurrence but, according to their mutual testimony, Peterson did not wish to fire him after speaking to Stoneburner, who cautioned that Peterson should calm down and first speak to Griffith before taking any action. Peterson agreed to this mode of procedure and, thereafter, to Stoneburner's innocent scheduling of Griffith on November 3. The evidence shows that, on November 3, Borg told Berg and Brown of Griffith soliciting her to sign a union card, with Brown cautioning silence on the spread of this information. On that evening, at 5 p.m., Stoneburner told Brown of the Peterson-Griffith altercation of the preceding Friday and of Stoneburner's and Peterson's agreement not to schedule Griffith for work until he saw and spoke with Peterson regarding Griffith's display of arrogance on October 31. Brown expressed surprise that Peterson failed to discharge Griffith "on the spot."

3. The uncontradicted facts regarding the forces supporting and the mechanics of the discharge demonstrate that Peterson, the aggrieved manager, did not seek Griffith's discharge after Peterson spoke with Stoneburner on the evening of October 31 and was not involved in the *decision* to discharge him (Tr. 342). The evidence, beyond cavil, shows that Brown—whose opinion and aid was not sought, and who ordinarily does not participate in managers' hiring and firing decisions—was the sole moving party in the discharge of Griffith. The testimony of record is clear that the aggrieved Peterson relinquished his desire to fire Griffith, and the only person thereafter involved and subject to personal upset and irritation on this question was Larry Brown. Larry Brown, on November 4, when he suddenly learned of Stoneburner's action, became supremely irritated with Stoneburner's scheduling of Griffith, not because of a lost opportunity to discipline him but because the publication of the work schedule prevented Respondent from immediately discharging Griffith. At this time, of course, even if Griffith had only until Wednesday, rather than until Thursday, November 5, to "see Jess," Brown was already indignant that Griffith could not have been already set for discharge. Since Brown had thus already determined to discharge Griffith a full day prior to the expiration of the time Stoneburner (and he) set for Griffith's act of contrition, it is unnecessary to decide whether—as was Peterson's desire (Tr. 311)—Griffith see him before he started to work again (i.e., by Thursday, November 6) or by the end of Wednesday, November 5. Brown wanted him fired as early as November 4 but desisted because of the published work schedule (Tr. 311). Moreover, even if it were necessary to decide the scope afforded to Griffith, to "see Jess," I conclude that neither Peterson nor Stoneburner attached "Tuesday or Wednesday" as a condition; and that the only condition was that Griffith "see Jess" before he started to work (on Thursday). I specifically credit Griffith that Stoneburner did not mention a particular period and discredit Stoneburner's and Brown's contrary testimony ("Two days are enough") as fabricated to cover the discharge. I credit only so much of the evidence as discloses that Peterson wanted to see Griffith before he started to work; that Stoneburner and Peterson gave Griffith until Thursday, November 6; that even if, as Respondent's witnesses assert, Griffith had only until Wednesday, Respondent's witnesses testimony shows that Brown desired Griffith to

be discharged as early as Tuesday, November 4—lamenting the inability to do so. Thus Griffith's failure to "see Jess," even by Wednesday, is a mere pretext.

4. I do not fully comprehend Respondent's position with regard to the hiring of Steve Donovan, allegedly on October 31, 1980, as a cook. If, as Peterson testified, Donovan was hired on October 31 as a replacement for the offending and offensive Griffith, there is no reason Griffith was not given his walking papers on and after October 31 and certainly by November 3. Further, I am puzzled that Stoneburner did not know (a) that Donovan was hired to replace Griffith; and (b) whether anyone actually did Griffith's job after the discharge (Tr. 589). I am further puzzled by Stoneburner's innocence since the matter was apparently discussed with Peterson at the time (Tr. 303–304). Thus it is unnecessary to find that Donovan was not hired as a replacement for Griffith, but merely to reject, as I do, Peterson's testimony that on *October 31* he hired Donovan as Griffith's replacement. I conclude only that Donovan was interviewed on October 31 and hired as a cook.[17]

5. Brown's testimony asserting that he caused Griffith's discharge because, by Wednesday, Griffith had failed to "see Jess" is not credited for other reasons. Brown's angry exclamation to Stoneburner on November 4 was not preceded by any recommendation of discharge by either Stoneburner or Peterson. On the contrary, Peterson explicitly stated, in his December 1980 pretrial statement to the National Labor Relations Board, that at this November 4, 1980 meeting: "Nothing was said at this time about terminating Griffith." I conclude that Peterson was not telling the truth at that time in particular, and that Brown was insistent that Griffith be terminated. Finding that Peterson and Stoneburner made no recommendation to cause Brown's outburst, I find that it was Brown, and Brown alone, who wanted to discharge Griffith. I conclude that his angry November 4 announcement[18] found its source in the information Brown received from Borg (concerning Griffith as a card distributor) on November 3 and especially the Union's request for recognition earlier on that same day, November 4. I specifically discredit Brown's testimony (Tr. 473) that, on November 4, Stoneburner and Peterson told Brown that they, together, previously decided to fire Griffith. At the very least, such testimony contradicts Stoneburner's and Peterson's testimony and Peterson's prior statement. It also is inconsistent with the circumstances.

In view of all these circumstances, and in view of the General Counsel's prima facie case, I conclude that Respondent's stated defense that Griffith was discharged on November 5 for insubordination was at least a mere pretext with regard to his failure to see Peterson before working and otherwise palpably false (with regard to leaving without Peterson's permission) masking its true reasons, Griffith's union activities, which were confirmed on the morning of November 3, and its alarm at receiving the Union's claim of majority status and recognition request on November 4. The above findings make it unnecessary to inquire into or analyze the facts as if there was a genuine "mixed motive" in the discharge. *Golden Beverage of San Antonio*, 256 NLRB 469, 472 fn. 14 (1981).

In view therefore of proof of Respondent knowledge, the precipitate timing in the face of expression of union animus, and the false and pretextual explanations, I conclude that on November 5, 1980, Respondent, in violation of Section 8(a)(3) and (1) of the Act, discharged Jody L. Griffith, as alleged.

The Discharge of Betty J. Brock

Brock, first employed by Respondent on September 29, 1980, was terminated on December 22, 1980. Respondent asserts that she was laid off at that time and the General Counsel alleges that she was discharged. In any event, there is no dispute that she was thereafter asked to return to work and did return to employment on the Saturday before Easter Sunday, April 1981, and that she quit her subsequent employment with Respondent at the Lemon Drop Inn on June 15, 1981.

On September 29, 1980, she was hired by Manager Keith Stoneburner as a cashier-hostess notwithstanding her original inquiry and request was to be hired as a waitress. I credit her testimony, undenied on this record, that when she was hired Stoneburner told her that he had a job only as a hostess-cashier but that, when winter came, and things got slow, she might be able to do some "waitressing." At the time that she was hired, there were already two other hostesses: Toula Trifon, who worked 4 days per week, and Karen Bail, who worked 2 days a week, principally on the weekends. Brock was hired to work 4 days a week, Friday through Monday, inclusive.

In early October 1980, Brock first met with a representative of the Union and, thereafter, at the end of October or beginning of November, attended a union meet-

[17] Peterson *testified* that he *hired* Donovan on October 31 (Tr. 302–303). Yet Respondent records also show that Donovan was *hired* both on November 5 (R. Exh. 6) and on November 4 (G.C. Exh. 15). There was no explanation advanced for this three-way confusion. If he were hired on November 4 or 5, this would be consistent with a hiring *after* the Brown decision to discharge Griffith.

[18] Brown's anger at the November 4 meeting is not unreasonable. He gained actual knowledge of Griffith's activity as a card distributor on Monday morning, November 3. In a meeting, later on November 3, he shows surprise that Peterson did not discharge Griffith "on the spot" (Tr. 474). On the next day, November 4, he is met with the Union's letter requesting recognition and bargaining. He immediately calls a meeting of his Lemon Drop supervisors for the same afternoon and discovers that Stoneburner, innocently, scheduled Griffith for work on Friday, November 7, and showed the schedule to Griffith. The discharge for union activities, in view of Griffith receiving permission to leave, of course, can no longer clearly rest on the October 31 window washing incident; hence, the "insubordination" of failing to "see Jess" in the artificial Tuesday-Wednesday period. Why Stoneburner added the false ground of Griffith's failure to receive permission to leave is a matter not subject to immediate analysis. What *does* explain Brown's change in attitude, from his evident November 3 surprise and irritation (that Griffith was not discharged "on the spot"), when he knew only that Griffith was a union card distributor, to his November 4 display of real anger and dismay at Stoneburner for scheduling Griffith for work, is Brown's receipt of the Union's recognition and bargaining request earlier on November 4, which prompted the November 4 meeting of supervisors. Brown recognized the new seriousness of the situation: now, no mere card distribution, but a claim of majority status and a demand for bargaining. That accounts for Brown's serious anger and his dismay "that Griffith could not be immediately discharged because Stoneburner scheduled him for work. Any Griffith failure to "see Jess—whether by Wednesday or Thursday—falls as a contrivance.

ing. At the election of December 17, 1980, she acted as the union observer.

Larry Brown admitted that he was surprised when Brock was brought in as the union observer at the preelection conference immediately prior to the December 17, 1980 election. He also admitted stating that he was surprised that Brock was the union observer. Brown also admitted having said that: "Seniority has no place in the restaurant business."

After the December 17 election, Brock was next scheduled to work on Saturday, December 20, from 11:30 to 7 p.m. At that time Stoneburner was the manager on duty.

Before she began work about 11 a.m., while she was drinking tea, Stoneburner asked whether she had served tea to herself. When she answered that she had, he told her to pay for it. At that moment, Stoneburner walked away and, directing his comments to nearby cooks, told them that thereafter there would be no more employee personal phone calls and, saying this, he turned and looked at Brock. Brock then paid for the tea and commenced working.

The evidence shows that Respondent had a rule whereby enployees did not pay for their coffee but paid for tea. It is also clear, on this record, according to Brock's credited testimony, that she honestly believed that both tea and coffee were freely provided by Respondent whereas food was not. I also credit Brock's testimony that no manager ever told her of a rule preventing service by an employee of any food or beverage consumed by the employee. I also find that, as Respondent's witnesses testified, Respondent's managers, from time to time, did caution other employees that they were not to consume food or beverages which they themselves prepared; but that Brock did not know of such rule.

It is also the company rule that there are no incoming phone calls to be relayed to employees unless it is a case of emergency. With regard to outgoing calls, employees are allowed such calls in case of an emergency or in arranging a car ride for transportation. I find that although Brock's husband, on Saturday, December 20, attempted to telephone her, she never told Peterson or Stoneburner that she was expecting an emergency phone call regarding her sick mother. Brock also admitted that, after her return to the Lemon Drop Inn in April 1981, she observed the rule of not serving herself, whether it was tea or food.

After her husband had attempted to telephone her at the Lemon Drop Inn on Saturday, December 20, Brock worked on Sunday, December 21 from 8 a.m. to 3 p.m. Sometime immediately after 3 p.m. on Sunday, as she was punching out, she overheard Manager Stoneburner, in a snickering tone, tell Manager Peterson that Brock had received phone calls and that Stoneburner had not put them through to her.

While Stoneburner admits receiving a phone call about 6 p.m. on December 20 from Brock's husband, he denies discussing any such phone calls with Peterson. In addition, with regard to his admonishing Brock to pay for the tea, he admits asking her whether she was paying for the tea and asserts that Brock told him that she had not paid for the tea but planned to pay for it and inquired whether Stoneburner was accusing her of stealing. Stoneburner testified that he had often spoken to employees about Respondent's food policy whereby tea must be paid for but not coffee. He did not say he spoke with Brock.

With regard to this conflict of testimony, I credit Brock both on the straightforwardness and particularity of her testimony. The demeanor of Respondent's managers was not impressive and they have already shown a lack of credibility in their testimony. I noted, in particular, that Peterson and Berg often testified, both on direct and cross-examination, with great pauses between the questions and answers as if each element of the question was being construed prior to an answer. While this conduct, under other circumstances, might demonstrate serious consideration, thoughtfulness, and restraint, here it struck me as a preliminary to rehearsed testimony, particularly in the direct examination, and particularly in that they both testified in that fashion. In any event, the consistent lack of spontaneity was clear. With regard to Stoneburner, although his demeanor on the witness stand was impressive and his answers spontaneous, I carefully observed and compared both Brock and Stoneburner. I believe that Brock, although she has at least a financial stake in the outcome as a discriminatee, described the snickering conversation between Stoneburner and Peterson with such evident attention to detail that I do not believe that she was fabricating this story. I credit her and discredit Stoneburner's denial that there was no such snickering conversation between him and Peterson regarding the failure to convey to Brock her husband's telephone call on the preceding day.

When Brock arrived at work early on the following day, Monday, December 22, about 10 a.m., she spoke with Larry Brown and Berg in Joel Berg's office. She told them that she was being harassed, treated badly, given the silent treatment, and she had not received telephone calls from her husband. She also mentioned the incident regarding her paying for the tea and the fact that Peterson and Stoneburner had snickered the prior day with regard to not putting phone calls through to her. Berg made no response but Brown told her that Stoneburner and Peterson ("The two boys") were being "crucified" and that a "lot of things were coming down on them." When Brock said that Stoneburner had displayed a great deal of playfulness and bad language in the kitchen, Brown answered that the two managers were being crucified. The meeting lasted more than a half hour and Brown thanked her for her statements. She then started her normal (11:30 a.m. to 7 p.m.) shift.

About 3 p.m. Berg told her to come into his office. He told her that he did not know whether it was good news or bad news to her, but he had to lay her off because business was slow. He told her he did not need three hostesses in view of the lack of work. Brock worked to 5 p.m. instead of 7 p.m. and left the Lemon Drop Inn.

Brock admits that in the last week, she was scheduled for 3 days of work instead of 4, but also testified, without contradiction, that in a prior conversation with Manager Joel Berg, he told her that there would be no layoff

after the first of the year because business would be expected to pick up.

Brown testified that he, indeed, said that he was very surprised to see Brock as the union observer and that her appearance on December 17 at the election was his first knowledge of her support of the Union. Brown admitted that Brock was the only employee laid off and testified that she was selected because she was not a student who would be the subject of layoff by attrition; that she was laid off because there were not enough hours of work for a third hostess-cashier and therefore not enough hours to accommodate her. Berg testified that, after Brock was laid off, the remaining hostesses were required to work longer hours and that one of them complained (Tr. 522). Berg also testified that Brock often complained about the quality (youth) of the waitresses and other working conditions.

Evidence introduced by Respondent demonstrates that the summer months are the peak months of Respondent's business and that Respondent traditionally shows diminishing profits commencing with September and running through to December of each year (R. Exh. 7). There is also no question that the number of hours worked per week by hostesses in the weeks commencing December 14 and 21 declined from 54-1/2 to 39-3/4 hours. However, the record shows that the number of hours worked per week for hostesses in the week ending November 9 was 67-3/4; November 16, 70-3/4; November 23, 51; November 30, 60; December 7, 68; December 14, 54-1/2; December 21, 39-3/4; December 28, 49-3/4; January 4, 43-1/2 and Janaury 11, 37-3/4 (R. Exh. 8). The peak number of hours for hostesses shown on the evidence of record was 80 hours for the week ending October 5 followed by 77 hours for the week ending October 12 and 73-3/4 hours for the week ending October 19. For the week ending October 26, there were 62-1/2 hours available and for the week ending November 2, 72 hours and the week ending November 9, 67-3/4 hours. The evidence also shows (G.C. Exh. 15) that in the period October 6 through October 27, 1980, when the availability of hours worked for hostesses declined from 80-3/4 hours to 62-1/2 hours, Respondent hired 11 waitresses.

Brown testified that in November 1980, "long prior" to the December 17 National Labor Relations Board election (and Brown's knowledge of Brock's union sympathy) he and Berg "made the decision to terminate" Brock (Tr. 496). This was due to a decline in business, according to Brown, whereby Respondent did not need three hostesses. His testimony was unclear as to whether this was in early November when Respondent's hours for hostesses for the week ending November 2 were 72 hours (or for the week beginning November 9, 67-3/4 hours; or the week beginning November 16, 70-3/4 hours; or the week beginning November 23, 51 hours,[19] or whether it was the week beginning November 30 when the number of hours for hostesses rose to 60 hours). At any rate, the first charge in this case was filed and received on or about November 10, 1980. About that time, Brown had a meeting with his three Lemon Drop managers and Respondent's labor relations consultant, William Sample. In that meeting, in November 1980, Brown testified that Sample told him, after Brown and Berg had discussed the proposed Brock layoff, not to lay off any employees pending disposition of the election petition. Brown testified that he wanted to lay Brock off at that time, i.e., in November. Brown further testified that on seeing Brock as the union observer at the December 17 election, he told Sample that Respondent had long before decided to terminate her and that since Respondent was going to do so, Respondent could expect receiving an unfair labor practice charge filed on Brock's behalf. Sample was never called to corroborate Brown's testimony in this regard.

Berg testified that he was involved in a decision to lay off Brock; and that in the fall, there was a falling off of business. Berg also testified that Brock was the least senior hostess and that *seniority was a factor* in her layoff, and that the decision to lay her off occurred in November, but it took until December 22 to lay her off because of professional advice not to lay her off until after the election.

Quite apart from the General Counsel's prima facie case (knowledge, abrupt termination), I have weighed both Respondent's supporting economic evidence and the resulting Brown and Berg testimony on the timing and motivation of Brock's termination. I do not credit it. I do not credit it because Sample was not produced to corroborate the conversation; because the economic circumstances in November did not support Respondent's testimony; because Respondent was inconsistent on whether seniority was a factor (except in Brock's case) because she was the only employee laid off for lack of work; because it did not deny or explain its failure to offer her a waitress job even in the face of slow business as her uncontradicted testimony indicated; and because Respondent, in November, when it allegedly made the decision to lay Brock off, hired 11 waitresses.

What particularly attracted my attention was Berg's testimony that this decision arose from restaurant business having slowed "more and more and more [and] we knew that we did not have the amount of hours for the amount of hostesses we had" (Tr. 515). The context of that testimony shows and requires that this was the economic consideration underlying this alleged "November" (i.e., before Brock was known to be a union supporter) discussion with Sample concerning layoff of a hostess.

Respondent's records (R. Exh. 8), however, fail to support the assertion that decline in hostess hours led to the layoff: 72 hours' hostess hours worked in the week beginning (Sunday) November 2; 67-3/4 hours in the week beginning November 9; 70-3/4 hours in the week beginning November 16; 51 hours in the week beginning November 23; and 60 in the week beginning November 30. In December, for the week beginning December 7, the hours rose to 68; for the week beginning December 14, 54-1/4 hours. In short, the first precipitate drop occurred in the week ending December 21 when the hours fell to 39-3/4 (but rose to 49-1/4 hours in the week beginning December 28).

[19] The week begining November 23, Thanksgiving week, is a slow week, according to Brown, for the type of restaurant they ran.

Thus, except for the week beginning November 23 (Thanksgiving week was a slow and historically exceptional week for the Lemon Drop Inn-type of restaurant), the loss of hours, comparing all October and the regular November weeks, is marginal: the remaining poorest November week, 60 hours in the week ending November 30 is only 2-1/2 hours less than the *poorest* week in October (62.50 hours, October 26); and no layoffs were planned or perfected in October.

I conclude that there was no *November* decline in hostess hours justifying a decision to lay off Brock; that the Berg testimony concerning a November decision based on November decline of hours was not supported by Respondent's records or corroborated by the professional advisor (Sample) who allegedly suggested against layoffs (in November) until after the election (Tr. 515); that the first precipitate work decline occurred in the week beginning December 21, and that it was *then* that the decision was made to lay off a hostess, Brock. I do not credit Brown's—or Berg's—testimony of a November decision on Brock.

I further conclude that Respondent, in this proceeding, showed clearly inconsistent positions concerning company policy on *seniority* in the selection for layoff. A comparison of Brown and Berg supports the inconsistency.

Respondent failed to deny or explain Brock's testimony that Stoneburner told her, in late September 1980, that she would be considered for "waitressing" when things got slow, and its records show that, in November (when business was allegedly getting slower and slower, according to Berg), Respondent hired 11 waitresses (whether these were replacements is immaterial) without then, or thereafter, asking Brock to become a waitress.

Regarding Brock, therefore, I regard Respondent's union *animus*, its knowledge (December 17) of Brock's position as a union supporter and then the timing of the precipitate December 22 termination as constituting a prima facie case. Further, I regard that the Stoneburner-Peterson snickering concerning the Brock phone call he had not put through as the kind of petty harassment, given Respondent's animus, which might be directed against Brock, then recently discovered as a union supporter. I also note (a) that Brock's testimony is undenied that she told Brown and Berg, immediately before her termination, that she was being harassed, treated badly, and given the "silent treatment." If this were untrue, it should have been denied and was not; (b) that Brock was the only employee laid off for lack of work; (c) Respondent was hiring 11 waitresses when, according to Berg, business was allegedly falling off; and (d) the other hostesses were working longer hours as a result of the layoff. In addition, there was the above Respondent specific confusion concerning whether *seniority* was or should have been considered in the Brock layoff, and I found Berg's testimony, putatively supporting an economic defense, picturing Brock as a crochety, chronic complainer against coemployees and working conditions, constituting a new and surprising element suddenly introduced to bolster the selection if not the sudden termination.

Since Respondent conspicuously failed to support its economic defense, in view of the November hostess hours worked (allegedly the basis for terminating a hostess), statistics showing little decline, contemporary hiring of a large number of waitresses, and Respondent's failure to call Sample as a witness to show an alleged *November* economic *decision* on terminating Brock, it would appear that Respondent's economic defense to the Brock termination, like Griffith's "insubordination," is another post-hoc pretext. I so find.

Moreover, even if it be assumed, arguendo, that falling business activity did require a hostess to be laid off, since Respondent's own testimony (Brown) undermines *seniority* as the dispositive criterion for selecting Brock, some *other* rationale must have entered into the *selection*. The quality and quantity of Brock's work, other than Berg's observations never communicated to Brock, were not subject to attack in this proceeding. Compared to Brock regularly working 4 days per week, hostess Bail regularly worked only 2 days per week and, after the Brock termination, complained over the resulting longer hours.

In short, in view of the General Counsel's prima facie case, the ominous failure to call Sample to corroborate an alleged November decision to lay off *anybody*—for any reason—the fact that seniority was not a dispositive factor in determining who was to be laid off, the unexplained petty harassment on December 22 and Respondent's failure to offer her or even consider her, for a waitress job, when it was hiring waitresses, I conclude that the Brock termination would be, arguendo, a "mixed motive" case requiring the application of the rule in *Wright Line*, 251 NLRB 1083 (1980). I would further conclude, for the above reasons, that Respondent has failed to support its burden of proving that the *selection* of Brock for termination was based on considerations wholly apart from those constituting the prima facie case.

With regard to Respondent's rehiring of Brock in April 1981, it may be pointed out that complaint on her behalf issued on February 19, 1981; and that Respondent entered its denial concerning the unlawfulness of the Brock termination on February 26, 1981 (G.C. Exh. 1(p)).

Rehiring Brock in April 1981 clearly bears on the above resolutions of *animus* and selection. On the other hand, it is unknown whether, if the Brock complaint had not issued, she would have been rehired or whether Respondent, in rehiring her, acted for monetary motives or otherwise. The General Counsel proved a prima facie case: knowledge, timing, animus. The remaining findings in such a situation are that a consideration of all the evidence in the consolidated case concerning the December 22, 1980 Brock termination preponderates in favor of the conclusion that Respondent's economic defense is pretextual; and the further conclusion that, whether or not Respondent had sufficient economic basis for terminating her, Respondent's *selection* of Brock violated Section 8(a)(3) and (1) of the Act. Respondent's ambiguous rehiring of Brock 4 months thereafter is another matter, both as to its rationale and as to the nature of the terms and conditions under which she then worked. Neither of these factors was litigated in this proceeding.

CONCLUSIONS OF LAW

1. By promulgating and maintaining (in its "Lemon Drop Personnel Policies" Rules 1, 2, and 5) rules of employee conduct which forbid, inter alia, solicitation regarding labor organizations by employees during "working time" and forbid, inter alia, off-duty employees to "enter or remain anywhere on" Respondent's premises for the purpose of solicitation, Respondent, in violation of Section 8(a)(1) of the Act, has promulgated and maintained presumptively unlawfully broad rules preventing such solicitation, *Mandarin*, 221 NLRB 264 (1975), cf. *GTE Lenkurt, Inc.*, 204 NLRB 921 (1973); but see *Tri-County Medical Center*, 222 NLRB 1089 (1976); since (a) such rules do not clearly contain a statement that such restrictions on lawful organizational activity do not apply during break periods, mealtimes, and other specified periods during the workday, or prior thereto or thereafter, when employees are properly not engaged in performing their work tasks, *T.R.W. Bearings*, 257 NLRB 442 (1981); and (b) Respondent has failed to prove that such a restriction is required to ensure production, safety, or discipline. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 573 fn. 22 (1978).

2. By threatening employees that Respondent would close its doors and go out of business in the event they selected a labor organization as their collective-bargaining representative, Respondent unlawfully coerced employees within the meaning of Section 8(a)(1) of the Act.

3. By terminating the employment of Jody L. Griffith on or about November 5, 1980, and the employment of Betty J. Brock, on or about December 22, 1980, because in each case, said employees engaged in activities on behalf of Hotel, Motel, Restaurant, Bar and Club Employees Union Local No. 99, Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO, herein called the Union, Respondent unlawfully discriminated against said employees, discouraging membership in the Union, thereby violating Section 8(a)(3) and (1) of the Act.

4. The unfair labor practices engaged in by Respondent affect commerce within the meaning of the Act.

THE REMEDY

It having been found that Respondent made an unlawful threat, promulgated and maintained unlawful rules, and unlawfully terminated the employment of Jody L. Griffith and Betty J. Brock in violation of Section 8(a)(3) and (1) of the Act, I shall recommend that Respondent be ordered to cease and desist from any such future conduct. Further, I shall recommend that Respondent be ordered to offer Jody L. Griffith full and immediate reinstatement to his former job or, if it no longer exists, to a substantially equivalent position, without prejudice to his seniority and other rights and privileges. I shall make the same recommendation with regard to Betty J. Brock notwithstanding that she was again employed by Respondent commencing April 1981. Although it appears that she may have well been employed in the same position (i.e., legally reinstated) from which she was terminated on December 22, 1980, and enjoyed the same terms and conditions of employment, including all privileges thereto, that is a matter which was not litigated in the instant matter and can better be resolved in a supplementary proceeding, if necessary, relating to Betty J. Brock. *Jack Hodge*, 227 NLRB 1482, fn. 1 (1977). In any event, I shall recommend that Respondent make both Griffith and Brock whole for any loss of earnings each may have suffered from their above respective dates of termination to the date Respondent shall make (or shall have already made, in the case of Brock) a full offer of reinstatement to their old jobs or a substantially equivalent position. Backpay shall be computed according to the Board's policy as set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950). Interest on backpay shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977). See generally *Isis Heating Co.*, 138 NLRB 716 (1962).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[20]

ORDER

The Respondent, Lemon Drop Inn, Inc., Duluth, Minnesota, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unlawfully terminating, discharging, or laying off employees, or otherwise discriminating against them, because they engage in activities on behalf of, sympathize with, are members of, or support Hotel, Motel, Restaurant, Bar and Club Employees Union Local No. 99, Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO, herein called the Union, or any other labor organization, or because they engage in concerted activities protected by Section 7 of the National Labor Relations Act.

(b) Threatening employees that, if they select a labor organization as their collective-bargaining representative, Respondent will close down.

(c) Promulgating or maintaining rules of employee conduct containing restrictions which prohibit employees, including off-duty employees, from engaging in solicitation on behalf of labor organizations during their "working time" anywhere on Respondent's property without incorporating in such rules a clear statement that such restrictions on solicitation, contained in such rules, do not apply during employee break periods, mealtimes, or other specified periods during the workday when employees are properly not engaged in performing their work tasks and are lawfully on Respondent's property or have a right to enter or remain on such property.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action deemed necessary to effectuate the policies and purposes of the Act.

(a) Offer Jody L. Griffith and Betty J. Brock immediate and full reinstatement to their former or substantially equivalent respective jobs, without prejudice to their se-

[20] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

niority or other rights and privileges previously enjoyed, discharging, if necessary, any employees hired in their places, and make them whole for any loss of pay each may have suffered by virtue of Respondent's discrimination against them, within the limits prescribed in the above section entitled "The Remedy."

(b) Post at its place of business in Duluth, Minnesota, copies of the attached notice marked "Appendix."[21] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

With regard to Case 18-RC-12817, it having been found that Respondent, in violation of Section 8(a)(3) and (1) of the Act, unlawfully discharged Jody L. Griffith at or about 9:30 p.m. on November 5, 1980; and the Union having filed its petition for certification (G.C. Exh. 1(g) in Case 18-RC-12817) at 8:34 a.m. on November 5, 1980, and therefore, I find prior to the 9:30 p.m. discharge of Jody L. Griffith, cf. *Choc-Ola Bottlers*, 192 NLRB 1247 (1971); 196 NLRB 1178 (1972); enf. denied 478 F.2d 461 (7th Cir. 1973); and the Union having filed a timely objection to the conduct of the December 17, 1980 election with respect to the discharge of Jody L. Griffith; and such discharge, having been found to constitute a serious unfair labor practice, a fortiori constituting objectionable conduct which occurred on a date between the filing of the petition and the date of the election herein, which conduct materially affected the conduct of the election, *Ideal Electric Co.*, 134 NLRB 1275 (1961), I conclude and shall recommend to the Board that the aforesaid timely objection to the conduct of the election be sustained.

Additionally, having found that Jody L. Griffith was unlawfully discharged by Respondent on November 5, 1980, I conclude and recommend that the General Counsel's otherwise lawful challenge to his eligibility, voting, and ballot in the December 17, 1980 Board-conducted election be rejected since, for purposes of said election and the National Labor Relations Act, Jody L. Griffith was, at that time, and continued to be, an employee of Respondent and entitled to vote in said election; now, therefore, on the basis of the above dispositions sustaining the Union's timely objection and rejecting the General Counsel's challenge of Jody L. Griffith's eligibility and ballot at said election.

IT IS FURTHER ORDERED, that Case 18-RC-12817 be, and it hereby is, severed from the consolidated complaint and remanded to the Regional Director for Region 18; that the ballot of the employee Jody L. Griffith be opened and counted by the Regional Director in accordance with the National Labor Relations Board Rules and Regulations, and that a revised tally of ballots be issued and served on the parties. In the event the Union thereby receives a majority of the valid ballots cast, the Regional Director shall issue the appropriate Certification of Representative. In the event the Union has not received a majority of the ballots cast,

IT IS FURTHER ORDERED that the election conducted on December 17, 1980, shall be then set aside and the Regional Director shall conduct a new election when, in his discretion, a fair and free election can be held.

[21] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

SUPPLEMENTAL DECISION

Prior Proceedings

ROBERT W. LEINER, Administrative Law Judge. On December 21, 1981, I issued a Decision and recommended Order in the above-captioned consolidated case finding, inter alia, that Respondent committed certain violations of Section 8(a)(1) and (3) of the Act. In concluding that, as alleged in paragraph 5(a) of the consolidated complaint, Respondent, by its supervisor, Shift Manager Joel Berg, in violation of Section 8(a)(1), threatened to "close the doors . . . if the employees selected the Union as their bargaining representative," I credited the testimony of Ruby Cassidy and discredited Joel Berg's denial of any such threat. In so doing, I relied dispositively upon an adverse testimonial inference arising from Respondent's failure to call or recall a General Counsel witness, Sharon Borg (who, counsel for Respondent had expressly conceded, was friendly to Respondent), allegedly present when Berg threatened Cassidy, to corroborate Supervisor Berg's denial. The Board, as noted below, by its Order of August 17, 1981, holding such inference impermissible under the circumstances, *Hitchiner Mfg. Co.*, 243 NLRB 927 (1979), remanded my decision for the purpose of my reevaluating the Cassidy-Berg credibility issue without such an inference, both for purposes of the paragraph 5(a) alleged threat and for the effect, if any, on the unlawful terminations alleged in paragraph 6 (Jody Griffith and Betty Brock).

Ruby Cassidy, a former Respondent employee (discharged for cause), testified that on October 29 or 30, 1980, during the Union's organizing campaign, Supervisor Berg told her (Cassidy), in the presence of fellow-employee Sharon Borg,[1] that he had overheard Cassidy and Jody Griffith talking about the Union and that he "better not hear of it anymore because Mr. Hall [owner or Respondent] said he'd close the doors and we wouldn't have a job."

[1] The testimony of Borg preceded that of Cassidy. Borg credibly testified only that on November 3, 1980, she told Supervisor Berg and Chief Supervisor Larry Brown that Cassidy and Jody L. Griffith (an alleged discriminatee herein) had asked her to sign a union membership card on the previous day. Respondent discharged Griffith 2 days later, on November 5. The General Counsel made no inquiry from Borg concerning Borg's presence at any Berg conversation with Cassidy concerning the union activities. Such evidence came subsequently from Cassidy, as indicated above.

Berg denied Cassidy's testimony but admitted participating in a legally innocuous general conversation, 6 months before, concerning unions and plant closings with the advent of unions.

In crediting Cassidy and discrediting Berg's denial, I found it unnecessary in my original decision to pass on similar Jody Griffith testimony which the General Counsel elicited from Griffith only to show Berg's union animus. Griffith testified and Berg denied that in early October 1980, some weeks before the Union's organizational drive, in response to employee Connor's question (what would happen if Respondent had a union in Lemon Drop Inn?), Berg replied, "We close the doors."

In view of the Board's remand, it is now necessary to resolve the issue of credibility as to the alleged October 29 or 30 Cassidy-Berg conversation *without regard* to the aforesaid inference. Additionally, since the findings of Berg's unlawful threat and union animus related to my additional findings of unlawful motivation in the discharge and layoff of alleged discriminatees Jody L. Griffith and Betty J. Brock, alleged in paragraphs 6(a) and (b) of the complaint, the Board's remand further requires reconsideration of my 8(a)(3) findings in light of my anticipated findings in regard to the alleged Berg independent 8(a)(1) threat, above.

New and Supplemental Findings of Fact, Conclusions of Law Concerning Complaint Paragraphs 5(a) and 6, and Recommended Order

The credibility of Ruby Cassidy, a discharged employee who disregarded my sequestration order, was closely scrutinized by me, especially as to bias and motive. Where she testified that both she and *Griffith* were mentioned in Berg's October 29 or 30 threat, establishing thereby, inter alia, the essential element of Respondent's *knowledge* of Griffith's union activity, I regard it as significant that the testimony of Borg, a witness concededly favorable to Respondent, was not inconsistent with that of Cassidy on this point: that Borg, on November 3, told Supervisor Brown and Berg that Cassidy *and* Griffith asked her to sign a union card. Berg contradicted Borg, a friendly witness, and testified that Borg mentioned only Cassidy as a union card solicitor. Such a contradiction is, of course, crucial. If Berg were credited over Borg and Cassidy, there would be no proof of Respondent's knowledge of Griffith's union activity. In assessing Cassidy's credibility, I have not only carefully considered testimonial demeanor, closely and continuously observed by me at the trial, but I have also weighed Borg's testimony and Berg's motive in contradicting Borg. On that basis, I have no hesitation in concluding that Berg's contradiction of the reluctant testimony of a friendly witness was motivated by an attempt to evade the imputation of Responden's knowledge of Griffith's union activity; that Borg's credited testimony, in this respect, was wholly consistent with Cassidy's; and that Berg's contradiction of Borg was false and constituted a severely adverse element in judging his credibility. On this ground alone, for purposes of the threat alleged in paragraph 5(a), and without regard to any other factor, I credit Cassidy and discredit Berg.

Berg also denied Griffith's testimony that Berg made a similar remark redolent with union animus ("We close the doors") in early October 1980. Cf., e.g., *NLRB v. Jamaica Towing*, 632 F.2d 208 (2d Cir. 1980). I pass on it now only to support the likelihood that Berg made a similar remark to Cassidy (as credibly testified by Cassidy) during the organizational drive, a few weeks later. In preferring the testimony of Griffith to that of Berg, I credit Griffith if only because Berg consistently impressed me as an untrustworthy witness. Other significant instances of Berg's lack of credibility have already been established in my basic Decision, further causing me to credit Cassidy in preference to Berg. Thus, for example, Berg was untruthful in his testimony concerning the economic reasons underlying the necessity for the termination of Betty Brock; he manufactured a baseless, uncorroborated further reason for selecting Brock for layoff, picturing her as a crotchety, chronic complainer against coemployees; and, as I closely observed him on the witness stand, Berg's testimony demonstrated both a lack of spontaneity and an apparent reliance on rehearsed testimony. In contrast, Cassidy impressed me as a forthright and candid witness whose words rang true.

For all of these reasons, I conclude that Cassidy (notwithstanding the impediment of her being a discharged employee) testified truthfully and Berg untruthfully in describing Berg's October 29 or 30 threat to close down, as alleged in paragraph 5(a) of the complaint; that Berg's threat violated Section 8(a)(1) of the Act and demonstrated Respondent's union animus; that Respondent, as previously found, violated Section 8(a)(3) and (1) of the Act, as alleged in paragraph 6 of the complaint, in terminating Jody L. Griffith and Betty J. Brock. In reconsideration of the entire record in light of the above new and supplemental findings, without in any way relying upon any inference flowing from Respondent's failure to call or recall Sharon Borg, I hereby adopt and reaffirm all of the findings, conclusions, and recommendations in my Decision and recommended Order of December 21, 1981.